TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL., PETITIONERS,

vs.

SELBY OIL & GAS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1942.

CERTIORARI GRANTED DECEMBER 14, 1942.

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INDEX—Continued

INDEX—Continued

CAPTION.

BE IT REMEMBERED, That at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Robert J. McMillan, presiding, and holding its sessions at San Antonio, Texas, for the Austin Division, which said term began on the 10th day of June, A. D. 1940, and continued in session to and included the 18th day of July, A. D. 1940, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 27 CIVIL ACTION.

SELBY OIL & GAS COMPANY and LEWIS PRODUCTION COMPANY,

versus

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON, AND G. A. SADLER, MEMBERS OF THE RAILROAD COMMISSION OF TEXAS, O. L. HASTINGS and C. F. DODSON.

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2 STIPULATION DESIGNATING RECORD ON APPEAL.

In the District Court of the United States for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company, Plaintiffs,

vs. Civil Action No. 27.

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, Defendants.

Appellants Selby Oil & Gas Company and Lewis Production Company, plaintiffs in the above entitled and numbered cause, and Appellees Railroad Commission of

Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, defendants in the above entitled and numbered cause, by and through their attorneys of record, stipulate and agree that the following shall be contained in the printed record on the appeal of the above case, to-wit:

1. Stipulation designating record on appeal.

2. Original complaint.

3. Answer of O. L. Hastings and C. F. Dodson.

4. Answer of Railroad Commission, Lon A. Smith, Ernest O. Thompson, and G. A. Sadler.

5. Amendment to answer of Railroad Commission.

6. Motion of defendants O. L. Hastings & C. F. Dodson to dismiss for want of jurisdiction.

7. Motion of defendants O. L. Hastings and C. F. Dodson to dismiss for want of equity, and subject thereto their first amended answer.

8. Amendment to answer of Railroad Commission (Second amendment).

9. Amendment to complaint.

10. Order of Court suspending trial for purpose of letting Railroad Commission take further action.

11. Judgment.

12. Notice of appeal, and acknowledgment of service of notice of appeal.

12-a. Motion for order directing that original exhibits be sent up as a part of the record on appeal.

3 13. Appeal bond.

14. Order directing original exhibits to be forwarded.

15. Transcript of evidence.

The above constitute a complete record of all the proceedings and evidence had in the United States District Court in this cause.

(S.) DAN MOODY,
Attorney for Appellants Selby Oil & Gas Company and Lewis Production Company.
Austin, Texas.

(S.) W. EDWARD LEE,
Attorney for Appellees O. L. Hastings and C. F. Dodson.
Longview, Texas.

GERALD C. MANN,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler.
Austin, Texas.

Filed 14th day of October, 1940.

4 COMPLAINT.

(Title Omitted.)

To Said Honorable Court:

Plaintiffs Selby Oil & Gas Company and Lewis Production Company bring this, their complaint, against the Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler, members of the Railroad Commission of Texas, and O. L. Hastings and C. F. Dodson, and thereupon complain and allege as follows:

I.

The jurisdiction of the subject-matter and parties in this cause is vested in this Court upon the following grounds:

(a) Plaintiff Selby Oil & Gas Company is a corporation duly organized and existing under the laws of the State of Delaware and a citizen of said State; and Plaintiff Lewis Production Company is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen of said State. Defendant Railroad Commission of Texas is a department and agency of the Government, organized and existing under the laws of the State of Texas, located at Austin, Travis County, Texas; Defendants Lon A. Smith, E. O. Thompson and G. A. Sadler, the duly elected, qualified and acting members of the Railroad Commission of Texas, are citizens of the State of Texas and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendants O. L. Hastings
5 and C. F. Dodson are citizens of the State of Texas and reside in Overton, Rusk County, Texas.

(b) The value of the property and the amount involved are in excess of $3,000.00, exclusive of interest.

(c) The order complained of in this case, granting to Defendants Hastings and Dodson a permit to drill Well No. 2 on their alleged 3.85-acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive Plaintiffs of their property without due process of law, and therefore is violative of the Fourteenth Amendment to the Constitution of the United States.

(d) This action is also brought under Chapter 76, Section 14, Acts of the Regular Session of the Forty-fourth Legislature (Article 6049c, Section 8, Vernon's Annotated Texas Civil Statutes, 1925), as an appeal to this Court (*Reagan vs. Farmer's Loan & Trust Co.*, 154 U. S. 362, 391-392) attacking as arbitrary and unreasonable the hereinafter alleged order of the Railroad Commission, as well as on the federal question raised by this pleading.

II.

On November 26, 1919, the Defendant Railroad Commission of Texas adopted and promulgated what is known as Rule 37, governing the spacing of oil and gas wells in the oil and gas producing areas in the State of Texas. Thereafter, on or about September 4, 1931, and May 29, 1934, the Railroad Commission of Texas amended Rule 37 in so far as said rule applied to the East Texas oil field, of which field the acreage involved in this suit is a part, and provided in such amendments that thereafter no wells should be drilled for oil or gas in the East Texas field at any point less than 330-feet from any property or division line, or less than 660-feet from any other completed or drilling well on the same or adjacent tract, provided the

Commission in order to prevent waste or to prevent the confiscation of property would grant exceptions in the manner set forth in such rule. Said amendments to the spacing rule dated May 29, 1934, are valid and binding rules and regulations, and govern the spacing and drilling of oil wells in the East Texas field, and have continuously remained in effect since the date of their adoption and are now in effect. Under said amended Rule 37, now in effect, no one is authorized to drill an oil or gas well in the East Texas oil field at any point less than 660-feet from any drilling or completed well or less than 330-feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of such rule in order to prevent waste or to prevent confiscation of property.

III.

Plaintiffs are the owners of an oil, gas and mineral leasehold estate in a certain 46.13-acre tract situated and located in the Mary Cogswell Survey, Rusk County, Texas, Tom Bean et al being the fee owners. Thereunder Plaintiffs own seven-eighths of the oil, gas and other minerals in place under said land and the right to enter thereon and by mining operations reduce said minerals to physical possession; and Plaintiffs have drilled wells thereon in accordance with the existing rules, regulations and orders of the Railroad Commission, and are now producing oil from said land.

IV.

On or about March 14, 1939, Defendants Hastings and Dodson filed an application with the Railroad Commission of Texas to drill Well No. 2 on their alleged 3.85-acre Jim Dickson lease, Mary Cogswell Survey, Rusk

County, Texas, in exception to Rule 37, and after due notice and hearing, at which Plaintiffs appeared and protested, the Railroad Commission entered an order on July 5, 1939, granting to Defendants Hastings and Dodson a permit to drill said Well No. 2 here involved, to be located 150-feet East of the West line and 130-feet Southwest of Well No. 1. A copy of this order is hereto attached, marked "Exhibit A", and made a part hereof for all purposes, the same as if copied at length here.

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V.

The order of the Railroad Commission of Texas granting Defendants Hastings and Dodson permit to drill Well No. 2 was arbitrarily and capriciously entered in violation of the Railroad Commission's Rule 37 and was made in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, because of the facts hereinafter shown:

Said alleged 3.85-acre tract now has one producing well thereon and said well is sufficient to enable said Defendants to produce all of the recoverable oil originally or now in place under said tract, and a second well on said tract is not necessary for the prudent development thereof or to prevent drainage of oil from said tract or waste or the confiscation of property within the meaning of Rule 37 or to enable Defendants Hastings and Dodson to recover their proportionate share of the recoverable oil reserves in the field of which said tract forms a part.

Defendants said tract of approximately 3.85-acres is now more densely drilled than the average density of the East Texas field and is more densely drilled than Plaintiffs'

lease or any lease which adjoins said 3.85-acre tract, with the exception of one lease drilled to a density of one well to 3.62-acres, another drilled to one well to 3.75-acres, and a tract of 1.75-acres having only one well on it. If said Well No. 2 is drilled and produced it will give Defendants Hastings and Dodson an advantage over operators of surrounding leases, including Plaintiffs, by reason of the density of drilling, in that said 3.85-acre tract will then be more densely drilled than any adjoining lease excepting the 1.75-acre tract whereon only one well is drilled. By reason of such density of drilling on said 3.85-acre tract and the method of proration enforced by the Railroad Commission in the East Texas field Defendants Hastings and Dodson will be enabled to, and will, drain Plaintiffs' oil from Plaintiffs' said lease. If any disparity in density now exists between Defendants Hastings and Dodson's lease and any adjacent lease thereto, the appropriate and legal method of protecting the rights, if any, of Hastings and Dodson, is by adjustment of allowable and not by granting additional wells to Hastings and Dodson, the production of which will enable Hastings and Dodson to drain oil from Plaintiffs' said lease. The Defendant Railroad Commission has refused to so adjust allowables within the East Texas field and has made an order granting said permit notwithstanding the fact that the drilling of a well thereunder and the production of oil therefrom will enable Defendants Hastings and Dodson to reduce to their possession oil which is the property of Plaintiffs. The Railroad Commission has by persistent policy refused to adjust allowables in such a situation as will be brought about by the drilling of a second well on said 3.85-acre tract, and the only relief which the Commission has offered in such a situation is the granting of permits to drill additional wells. In this instance Plaintiffs now have on their said lease a sufficient number of wells to produce their propor-

tionate share of the oil in said field and the recoverable oil reserves under their lease, and additional wells would not be necessary to so produce their proportionate share and recoverable reserves under their lease, except for the drilling of a second well on said 3.85-acre tract and the production of oil from such well.

9 The method of proration enforced by the Railroad Commission in the East Texas field in practical effect amounts to prorating among the wells in the field, on a per well basis, a daily field allowable fixed for the field by the Railroad Commission. At the time the order granting the permit to drill a second well on said 3.85-acre tract was entered said method of proration was in force, and the application of said method of proration to said 3.83-acre tract and to Plaintiffs' lease will operate to allow a substantially greater production per acre per day from the 3.85-acre tract than will be allowed from Plaintiffs' less densely drilled tract, resulting in drainage of Plaintiffs' lease, and this notwithstanding the fact that Plaintiffs' said lease is as favorably situated on the structure and has as productive sands as the tract of Defendants Hastings and Dodson.

The order of the Railroad Commission granting said permit to drill a second well on said 3.85-acre tract was made in the light of the existing proration orders in force in the East Texas field and the one is a constituent part of the other; and said permit to drill was granted as a part of the general scheme enforced by the Railroad Commission to control the drilling of wells in the East Texas field and production of oil therefrom. Said two orders should be considered together, and the validity of the order granting the permit, determined in consideration of the effect thereof, in view of the method of proration enforced in said field.

The order of the Railroad Commission granting a permit to drill a second well on said 3.85-acre tract operates to deprive Plaintiffs of their property without due process of law and to deny to Plaintiffs the equal protection of the law in violation of the due process clause and the equal protection clause of the Constitution of the United States.

10 The drilling of a second well on said 3.85-acre tract is not necessary to prevent waste of oil or gas; but, on the contrary, the drilling of said well and the production of oil therefrom will reasonably result in the drilling of some three or four offset wells and such concentration of drilling and production will increase the fire hazards existing in the field and will result in waste by reason of damage to the common reservoir, the lowering of pressures, channeling in the oil bearing sands, premature intrusion of water and entrapment of oil in the sands.

VI.

If the proposed Well No. 2 is drilled, Plaintiffs will in all probability be forced to drill additional wells at an expense of approximately ten thousand dollars ($10,000.00) each; which wells would be wholly unnecessary and none would be required except for the drilling of said Well No. 2 and the production of oil therefrom under existing proration orders. The expense of drilling such additional wells will be in the nature of damages to Plaintiffs. That to equalize density Plaintiffs would have to drill approximately fourteen additional wells; that such drilling is wholly unnecessary to the reasonable development of Plaintiffs' lease and would result in waste. The extent of drainage which Plaintiffs will suffer, notwithstanding offsetting of the proposed well, cannot be accurately estimated, and the nature of Plaintiffs' damage is irreparable. And, Plaintiffs have no adequate remedy at law to protect them from suffering such damage.

Wherefore, Plaintiffs pray that the Defendants herein be summoned to appear and answer herein, and that on final hearing hereof, the order of the Railroad Commission permitting Defendants Hastings and Dodson to drill said Well No. 2 be set aside and adjudged to be wholly null and void, and that judgment be rendered perpetually enjoining said Defendants, their agents, servants, 11 employees and assigns, from permitting or prosecuting any drilling operations under said permit and from producing oil or gas from any well drilled, or to be drilled, under said permit; and perpetually enjoining Defendant Railroad Commission of Texas and the members thereof from granting to said Hastings and Dodson, their assigns, or agents, permission to produce oil or gas from said Well No. 2, and from placing said well on the allowable production schedule, and from issuing to Defendants Hastings and Dodson, or their assigns, any certificate of compliance or pipe line certificate, or any character of certificate that will allow production from said well; and that injunction issue herein restraining Defendant Railroad Commission, and the members thereof, their agents, servants and employees, from granting any further permit to said Defendants Hastings and Dodson, or to their assigns, to drill any well on said alleged 3.85-acre tract of land; and Plaintiffs further pray for the issuance of a mandatory injunction to said Hastings and Dodson ordering that said Well No. 2, if drilled, or partially drilled, be plugged and effectually sealed in the manner required by law and in accordance with the rules of the Railroad Commission so as to prevent future production or flow or oil or gas therefrom; and Plaintiffs further pray for such other and further relief, general or special, in law and in equity, as they may be justly entitled to receive.

(S.) E. R. HASTINGS,

Tulsa, Oklahoma.

(S.) DAN MOODY,

Austin, Texas.

Attorneys for Plaintiffs.

12 EXHIBIT A.

State of Texas.

Railroad Commission of Texas,
Austin.

Case No. 16,504.

Rule 37.

= 2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas.

Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2 to be spaced as follows:

=2—150 feet east of the west line;
130 feet southwest of well No. 1.

It is Further Ordered that well No. 3 is hereby denied.

Entered at Austin, Texas, on this the 5th day of July, 1939.

LON A. SMITH,
Chairman.

.....,
Commissioner.

JERRY SADLER,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Railroad Commission entered on the above date.

.....,
Stanford Payne, Chief Deputy Supervisor Oil and Gas Division.

13 Filed 17th Day of July, 1939.

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14 ANSWER OF DEFENDANTS O. L. HASTINGS AND C. F. DODSON.

(Title Omitted.)

To Said Honorable Court:

First Defense.

The complaint fails to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Hon-

orable Court over the subject matter of the claim alleged in the complaint.

Second Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

Third Defense.

This suit is prematurely brought and this Honorable Court has no jurisdiction thereof for the reason that the Railroad Commission of Texas has not taken final action upon the application of Hastings and Dodson for a permit to drill well No. 2 on their 3.85 acre tract. The order of the Railroad Commission granting the permit to drill said well No. 2 is dated and was issued on July 5, 1939. At said time there was in effect and there is now in effect the order of the Railroad Commission dated August 30, 1933, and providing as follows, to-wit:

15 "It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments, and decrees written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed by the Railroad Commission for the filing of motions for

a new trial or a rehearing on said application. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of one of the leases adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application. Said motion for rehearing was filed with the Railroad Commission of Texas before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before the Railroad Commission of Texas and has not been acted upon and there has been no final action by the Railroad Commission with reference to the application of Hastings and Dodson to drill said well No. 2.

Fourth Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the government organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, E. O. Thompson and G. A. Sadler are the duly elected, qualified and acting members of the Railroad Commission of Texas and are citizens of the State of Texas, and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas.

Defendants deny that the order of the Railroad Commission granting them a permit to drill well No. 2 on their 3.85 acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive plaintiff of their property without due process of law, and deny that said order is violative of the Fourteenth Amendment to the Constitution of the United States.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph No. I of the complaint.

II.

Defendants admit the allegations contained in paragraph No. II of the complaint with reference to the promulgation of Rule 37 and admit that said rule, as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date, and that a true copy of said amendment to said Rule 37 is attached hereto and marked Exhibit "A" and made a part hereof.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph No. III of the complaint.

IV.

Defendants admit the allegations contained in paragraph No. IV of the complaint.

V.

Defendants deny that the order of the Railroad Commission of Texas granting them a permit to drill well No. 2 was arbitrarily or capriciously entered or that same

was in violation of the Railroad Commission's
17 Rule No. 37, and deny that said order was in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

VI.

Defendants say that the well which is permitted to be drilled by the order of the Railroad Commission of Texas upon the 3.85 acre tract owned by them is necessary to prevent drainage of oil from said tract and to prevent waste and to prevent confiscation of property, and is necessary to enable them to recover their proportionate share of the recoverable oil reserves of the field. Defendants say that they are informed and believe that the density of drilling as alleged in paragraph No. V of the complaint with reference to their tract and the surrounding tracts is correct. Defendants deny that by the drilling of a second well on their 3.85 acre tract they will be enable to drain oil from plaintiffs' lease. Defendants deny that the appropriate and legal method of protecting the rights of Hastings and Dodson is by adjustment of allowables and say that the appropriate and legal method of protecting said rights was adopted by the Railroad Commission in granting a permit to drill said well No. 2 to Hastings and Dodson. Defendants deny that there has been any application made to the Railroad Commission of Texas by plaintiffs or by the defendants Hastings and Dodson to make an adjustment of the allowables in connection with their properties and deny that the Railroad Commission has refused to make any adjustment of allowables in connection with said properties. The defendants Hastings and Dodson applied to the Railroad Commission of Texas for relief by being permitted to drill an additional well on their 3.85 acre tract, which relief was

granted to said defendants by the Railroad Commission of Texas. The plaintiffs have not applied to the Railroad Commission of Texas for relief either by the granting of additional wells on their tract or by the adjust-
18 ment of the allowables on the wells which plaintiffs have already drilled upon their said tract In this connection defendants say that plaintiffs have failed to exhaust their remedy before the Railroad Commission in that they have failed to apply to the Railroad Commission of Texas for relief either on the basis of an adjustment of allowables or on the basis of being permitted to drill additional wells upon their tract. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the plaintiffs' allegation that they now have on their said lease a sufficient number of wells to produce their proportionate share of the oil in said field and the recoverable oil reserves under their lease. Defendants deny that the method of proration enforced by the Railroad Commission of Texas amounts to a per well proration among the wells in the East Texas field. Defendants admit that the spacing orders of the Railroad Commission should be considered and construed together and that they form one method of regulating the production of oil from the East Texas field. Defendants deny that the order of the Railroad Commission granting a permit to drill a second well on the Hastings and Dodson 3.85 acre tract operates to deprive plaintiffs of their property without due process of law or to deny to plaintiffs the equal protection of the law in violation of the due process clause or the equal protection clause of the Constitution of the United States. Defendants say that the drilling of a second well on said 3.85 acre tract was necessary to prevent the waste of oil and gas as well as to prevent the confiscation of property and deny the allegations contained in paragraph No. V of the complaint, wherein it is alleged that said well was not necessary to prevent waste.

19 VII.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that if the Hastings and Dodson well No. 2 is drilled plaintiffs will be forced to drill additional wells at an expense of approximately $10,000. each. Defendants say that if plaintiffs consider the drilling of additional wells to be necessary to the protection of their property, or if said wells are necessary to prevent waste, the Railroad Commission will give due consideration to the advisability of granting additional wells to plaintiffs. In the event that the Railroad Commission grants to plaintiffs permits to drill additional wells plaintiffs will not be forced to drill said wells, but plaintiffs will be given the option of drilling said wells if they wish to do so in order to prevent waste or to prevent the confiscation of their property. Defendants deny that the expense of drilling any additional wells upon the plaintiffs' lease will be in the nature of legal damages. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that to equalize density plaintiffs would have to drill approximately fourteen additional wells on their lease, and defendants further say that they do not have knowledge or information sufficient to form a belief as to the truth of the allegations that the drilling of such wells will be wholly unnecessary in the reasonable development of plaintiffs' lease and that said drilling would result in waste. Defendants deny that the damages, if any, suffered by the plaintiffs are irreparable and further deny that plaintiffs have no adequate remedy at law.

Wherefore, defendants pray that they go hence with their costs without day and for such other and further relief as they may be entitled to receive.

(S.) J. A. STOREY,
Attorney for O. L. Hastings and C. F. Dodson.

Address: Vernon, Texas.

Service of the foregoing Answer by delivery of copy thereof to the undersigned is acknowledged, this the third day of August, 1939.

(S.) DAN MOODY.

20

EXHIBIT "A."

Railroad Commission of Texas,
Oil and Gas Division.

Oil and Gas Docket No. 120.

= 6-795

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field.

Austin, Texas, July 13, 1939.

Pursuant to previous notice and hearing in the adoption and amendment of rules and regulations by the Railroad Commission of Texas governing the conservation of crude oil and natural gas and the prevention of waste thereof, and in the light of the evidence introduced at various hearings held by the Commission and particularly the hearing held in the City of Austin, June 12, 1939, and in accordance with the findings of the Railroad Commission in its orders of August 26, 1935, September 3, 1937, and

October 8, 1937, that the closer wells are drilled the greater will be the recovery from the area so drilled, and in view of certain allegations contained in the written petitions recently filed with the Commission by various owners of oil and gas leases in the East Texas Field;

It is Hereby Ordered by the Railroad Commission of Texas that Rule No. 1 of Sub-Division II (Drilling) of Division 3, being special rules governing the East Texas Field, is hereby amended so that the same shall hereafter read as follows:

Rule 1. Spacing Rule. No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred (400) feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that the facts therein stated are within the knowledge of the affiant true, and

that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten (10) day's notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation.

Provided Further that the Railroad Commission of Texas, in order to prevent waste or to prevent the confiscation of property, may upon its own motion or order, issue or grant a permit or permits for the drilling of any well or wells for oil or gas nearer than 660 feet to any other completed or drilling well on the same or
21 adjacent tract of land or farm and nearer than 330 feet to any property line, lease line or subdivision line as hereinbefore prescribed whenever the Commission shall determine that the drilling of any such well or wells is necessary to prevent waste or to prevent the confiscation of property. When in the opinion or judgment of the Commission waste or confiscation of property is reasonably eminent or is taking place on any leasehold, the Commission may, on its own intitiative or motion, order a hearing for the purpose of determining whether such waste or confiscation of property is taking place. Such permit or permits shall be issued or granted only after at least ten (10) day's notice to the owners of said leasehold and to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that the drilling of any well or wells for oil or gas is necessary either to prevent waste or to protect the owners of said leasehold from confiscation.

No well drilled in violation of this rule without special permit obtained issued or granted in the manner prescribed in said rule, and no well drilled under such a special permit or on the Commission's own order which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule or on the Commission's own order shall be plugged.

The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

In the adoption and promulgation of this order, it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence, and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion.

RAILROAD COMMISSION OF TEXAS,

(Seal) LON A. SMITH, Chairman.

JERRY SADLER, Commissioner.

Attest:

C. F. PETET, Secretary.

Filed 3rd day of August, 1939.

ANSWER OF DEFENDANT RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

22 Filed August 4, 1939.

(Title Omitted.)

To Said Honorable Court:

First Defense.

The complaint fails to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter of the claim alleged in the complaint.

Second Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

Third Defense.

This suit is prematurely brought and this Honorable Court has no jurisdiction thereof for the reason that the Railroad Commission of Texas has not taken final action upon the application of Hastings and Dodson for a permit to drill well No. 2 on their 3.85 acre tract. The order of the Railroad Commission granting the permit to drill said well No. 2 is dated and was issued on July 5, 1939. At said time there was in effect and there is now in effect the order of the Railroad Commission dated August 30, 1933, and providing as follows, to-wit:

23 "It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments,

and decrees written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed by the Railroad Commission for the filing of motions for a new trial or a rehearing on said application. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of one of the leases adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application. Said motion for rehearing was filed with the Railroad Commission of Texas before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before the Railroad Commission of Texas and has not been acted upon and there has been no final action by the Railroad Commission with reference to the application of Hastings and Dodson to drill said well No. 2.

Fourth Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the government organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and

that defendants Lon A. Smith, E. O. Thompson and G. A. Sadler are the duly elected, qualified and acting members of the Railroad Commission of Texas and are citizens of the State of Texas, and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas.

Defendants deny that the order of the Railroad Commission granting to defendants Hastings and Dodson a permit to drill well No. 2 on their 3.85 acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive plaintiff of their property without due process of law, and deny that said order is violative of the Fourteenth Amendment to the Constitution of the United States.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph No. I of the complaint.

II.

Defendants admit the allegations contained in paragraph No. II of the complaint with reference to the promulgation of Rule 37 and admit that said rule, as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date, and that a true copy of said amendment to said Rule 37 is attached hereto and marked Exhibit "A" and made a part hereof.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraph No. III of the complaint.

IV.

Defendants admit the allegations contained in paragraph No. IV of the complaint.

V.

Defendants deny that the order of the Railroad Commission of Texas granting to defendants Hastings and Dodson a permit to drill well No. 2 was abritrarily or capriciously entered or that same was in violation of the Railroad Commission's Rule No. 37, and deny that said order was in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

VI.

Defendants say that the well which is permitted to be drilled by the order of the Railroad Commission of Texas upon the 3.85 acre tract of the defendants Hastings and Dodson is necessary to prevent drainage of oil from said tract and to prevent waste and to prevent confiscation of property, and is necessary to enable the defendants Hastings and Dodson to recover their proportionate share of the recoverable oil reserves of the field. Defendants say that they are informed and believe that the density of drilling as alleged in paragraph No. V of the complaint with reference to the Hastings and Dodson tract and the surrounding tracts is correct. Defendants deny that by the drilling of a second well on their 3.85 acre tract defendants Hastings and Dodson will be enabled to drain oil

from plaintiffs' lease. Defendants deny that the appropriate and legal method of protecting the rights of Hastings and Dodson is by adjustment of allowables and say that the appropriate and legal method of protecting said rights was adopted by the Railroad Commission in granting a permit to drill said well No. 2 to Hastings and Dodson. Defendants deny that there has been any application made to the Railroad Commission of Texas by plaintiffs or by the defendants Hastings and Dodson to make an adjustment of the allowables in connection with their properties and deny that the Railroad Commission has refused to make any adjustment of allowables in connection with said properties. The defendants Hastings and Dodson applied to the Railroad Commission of Texas for relief by being permitted to drill an additional
26 well on their 3.85 acre tract, which relief was granted to said defendants by the Railroad Commission of Texas. The plaintiffs have not applied to the Railroad Commission of Texas for any relief either by the granting of additional wells on their tract or by the adjustment of the allowables on the wells which plaintiffs have already drilled upon their said tract. In this connection defendants say that plaintiffs have failed to exhaust their remedy before the Railroad Commission in that they have failed to apply to the Railroad Commission of Texas for relief either on the basis of an adjustment of allowables or on the basis of being permitted to drill additional wells upon their tract. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the plaintiffs' allegation that they now have on their said lease a sufficient number of wells to produce their proportionate share of the oil in said field and the recoverable oil reserves under their lease. Defendants deny that the method of proration enforced by the Railroad Commission of Texas amounts to a per well proration among the wells in the East Texas

field. Defendants admit that the spacing orders of the Railroad Commission should be considered and construed together and that they form one method of regulating the production of oil from the East Texas field. Defendants deny that the order of the Railroad Commission granting a permit to drill a second well on the Hastings and Dodson 3.85 acre tract operates to deprive plaintiffs of their property without due process of law or to deny to plaintiffs the equal protection of the law in violation of the due process clause or the equal protection clause of the Constitution of the United States. Defendants say that the drilling of a second well on said 3.85 acre tract was necessary to prevent the waste of oil and gas as well as to prevent the confiscation of property and deny the allegations contained in paragraph No. V of the complaint, wherein it is alleged that said well was not necessary to prevent waste.

VII.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that if the Hastings and Dodson well No. 2 is drilled plaintiffs will be forced to drill additional wells at an expense of approximately $10,000. each. Defendants say that if plaintiffs consider the drilling of additional wells to be necessary to the protection of their property, or if said wells are necessary to prevent waste, the Railroad Commission will give due consideration to the advisability of granting additional wells to plaintiffs. In the event that the Railroad Commission grants to plaintiffs permits to drill additional wells plaintiffs will not be forced to drill said wells, but plaintiffs will be given the option of drilling said wells if they wish to do so in order to prevent waste or to prevent the confiscation of their property. Defendants deny that the expense of drilling

any additional wells upon the plaintiffs' lease will be in the nature of legal damages. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that to equalize density plaintiffs would have to drill approximately fourteen additional wells on their lease, and defendants further say that they do not have knowledge or information sufficient to form a belief as to the truth of the allegations that the drilling of such wells will be wholly unnecessary in the reasonable development of plaintiffs' lease and that said drilling would result in waste. Defendants deny that the damages, if any, suffered by the plaintiffs are irreparable and further deny that plaintiffs
28 have no adequate remedy at law.

Wherefore, defendants pray that they go hence with their costs without day and for such other and further relief as they may be entitled to receive.

(S.) GERALD C. MANN,
Attorney General of Texas.
(S.) JAMES P. HART,
Assistant Attorney General.

Address: State Capitol,
Austin, Texas.

(S.) EDGAR CALE,
Assistant Attorney General,
Attorneys for Defendants.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to the undersigned is acknowledged this 4th day of August, 1939.

(S.) DAN MOODY,
Attorney for Plaintiffs, Selby Oil & Gas Company and Lewis Production Company.

29 EXHIBIT "A"—Order of Railroad Commission of Texas, Oil & Gas Division, dated 7/13/39, omitted from the printed record, being heretofore copied at page 20.

* * * * * * * * * *

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

31 (Title Omitted.)

To said Honorable Court:

Come now the defendants the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson and G. A. Sadler, Members of the Railroad Commission of Texas, and, by written consent of the plaintiffs, first had and obtained, file this amendment to their answers, as follows:

I.

Amend Paragraph I under Fourth Defense by striking out the last sentence in said paragraph and substituting therefor the following:

Defendants specially deny that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). Defendants admit the allegations in Paragraph I (a) of the complaint with reference to the citizenship and residence of the defendants O. L. Hastings and C. F. Dodson. Defend-

ants deny the remaining allegations in Paragraph I of the complaint.

(S.) GERALD C. MANN,
32 Attorney General of Texas.

(S.) JAMES P. HART,
Assistant Attorney General.

(S.) E. R. SIMMONS,
Assistant Attorney General.

(S.) EDGAR CALE,
Assistant Attorney General, Attorneys for Defendants, The Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler.

Austin, Texas.

Consent and Acknowledgement of Service.

Consent to the filing of the foregoing amendment to the answer of the defendants, the Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler, is hereby given, and service of a copy of said supplemental answer is acknowledged this 10th day of June, 1940.

(S.) DAN MOODY,
Attorney for Plaintiffs, Selby Oil & Gas Company and Lewis Production Company.

Filed: 10th day of June, 1940.

MOTION OF DEFENDANTS, O. L. HASTINGS AND C. F. DODSON TO DISMISS FOR WANT OF JURISDICTION.

33 (Title Omitted.)

To Said Honorable Court:

Come now O. L. Hastings and C. F. Dodson, defendants in the above styled and numbered cause, and move the Court to dismiss Plaintiffs' Complaint for want of jurisdiction, and as grounds therefor say:

This suit is instituted by plaintiffs (pursuant to Article 6049c, Section 8, Vernon's Annotated Texas Civil Statutes, 1925, as amended) as an attack upon an order of the Railroad Commission granting to these defendants a permit to drill their No. 2 well on a 3.85 acre tract of land in the Mary Coggswell Survey, Rusk County, Texas.

I.

Plaintiff predicate jurisdiction of this Court on (1) diversity of citizenship, (2) an amount involved in excess of $3,000.00 exclusive of interest, and (3) the complaint that the order under attack deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the
34 United States.

II.

Notwithstanding the requisite diversity of citizenship (which is conceded) and although in the prefatory paragraph it is claimed that the amount involved is in excess of $3,000.00 exclusive of interest, it is made to appear from Paragraph VI of the complaint that plaintiffs' allega-

tion of damages is based on the mere "probability" that they may "be forced to drill additional wells" if these defendants drill the well permitted, and upon the claim that in order to "equalize density Plaintiffs would have to drill approximately fourteen additional wells". Said averments constitute all the allegations in respect to the amount involved, and show upon their face that they are speculative, conjectural, are not presently sustained, and will not be sustained unless the "probability" at some undetermined and future time materializes.

The next and only other ground upon which jurisdiction is predicated is that the order of the Railroad Commission granting these defendants the permit to drill their No. 2 Well upon said tract of land operates to deprive plaintiffs of their property without due process of law. The basis for this averment, as apparent upon the face of the complaint, is that:

1. Defendants' one well now on the said tract is sufficient to enable them to produce all recoverable oil originally or now in place thereunder, without necessity for a second well to prevent waste or confiscation of defendants' property;

2. Defendants' tract is more densely drilled than the average density of the East Texas field, and is more densely drilled than plaintiffs' lease or any lease adjoining defendants' tract, with the exception of three designated adjoining leases;

35 3. Defendants' second well would give them an advantage over plaintiffs and other surrounding operators by reason of the increased density, and defendants will be thereby enabled to drain some oil from plaintiffs' lease;

4. The best method of defendants protecting their rights would be by a readjustment of allowables on their well and not the drilling of an additional well. In this connection it is admitted that the Railroad Commission would not grant defendants relief by readjusting the allowable, but grants relief only by permitting, as here, an additional well;

5. The method of proration adopted and enforced by the Commission amounts, in practical effect, to prorating the field on a per well basis, and that the permit granted will operate to allow greater production per acre per day from defendants' tract than will be allowed to be produced from plaintiffs' tract; ,

6. The allowable or proration order of the Commission then in effect and the permit order here under attack should be construed as constituent parts, each of the other. A second well on defendants' tract is not necessary to prevent waste, but "will reasonably result in the drilling of some three or four offset wells and such concentration of drilling and production will increase the fire hazard existing in the field and will result in waste by reason of damage to the common reservoir";

7. If defendants' No. 2 Well is drilled, plaintiffs will "in all probability be forced to drill additional" and unnecessary wells;

36 8. To equalize density, plaintiffs would have to drill approximately fourteen additional and unnecessary wells; and

9. The extent of drainage which plaintiffs will suffer cannot be accurately estimated.

From the foregoing allegations, it is apparent that plaintiffs wholly failed to allege with that certainty required the amount of damages, if any, which plaintiffs would sustain should defendants drill their No. 2 Well. It is also made to appear that the same is but an attempt to have this Court substitute their conception of the fairness and reasonableness of the permit order for the means and methods adopted by the Commission to grant defendants the relief they claimed and have been awarded. Although the Commission might have adopted a fairer method of adjusting the rights of the parties hereto, the method adopted is not in contravention and violative of the due process clause of the Federal Constitution.

Wherefore, premises considered, these defendants pray judgment of the Court that the complainant be dismissed for want of jurisdiction, and for general relief.

(S.) LEE & PORTER,
Attorneys for Defendants, O. L. Hastings and C. F. Dodson.

Service Address:
501 Glover-Crim Bldg.,
Longview, Texas.

Filed: 11th day of June, 1940.

MOTION OF DEFENDANTS O. L. HASTINGS AND C. F. DODSON TO DISMISS FOR WANT OF EQUITY AND SUBJECT THERETO THEIR FIRST AMENDED ANSWER

37 (Title Omitted.)

To Said Honorable Court:

Plaintiffs having filed an amendment to complaint, now come O. L. Hastings and C. F. Dodson and, subject to

their motion to dismiss for want of jurisdiction, and with leave of the Court first obtained, file this their motion to dismiss, and as grounds therefor say:

I.

The complaint fails to state a claim against these defendants upon which relief can be granted.

II.

This suit is prematurely brought and this Court has no jurisdiction thereof for the reason that the Railroad Commission had not taken final action upon the application of Hastings and Dodson for a permit to drill their No. 2 well at the time this suit was filed. The order of the Railroad Commission granting permission to drill said well No. 2 was issued July 5, 1939. At said time, there was in effect and there is now in effect an order of the Railroad Commission dated August 30, 1933, providing as follows, to-wit:

"It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments and decrees
38 written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed

by the Railroad Commission for the filing of motions for a new trial or a rehearing on said application and order. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of an oil and gas lease adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application and order. Said motion for rehearing was filed with said Commission before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before said Commission and has not been acted upon and there has been no final action by said Commission with reference to the application of Hastings and Dodson to drill said Well No. 2, and the order granting permit therefor.

III.

Plaintiffs now here allege that they have been prevented by an order of said Commission from drilling sufficient wells on their property to develop their tract on the average acreage density of the tract herein involved, and by reason of same said petition is insufficient to admit of sufficient evidence to overcome the presumption of validity accorded the order under attack.

IV.

Plaintiffs do not allege that the boundaries of their lease and leasehold estate adjoin or are contiguous to the boundaries of the lease and leasehold estate of
39 these defendants, and by reason of same do not show themselves to be an interested party and affected by the order of the Commission under attack.

V.

Plaintiffs allege in substance that any disparity in density existing between its lease and that of these defendants

should be adjusted by a readjustment of allowable on defendants' well already drilled. Such allegations constitute a collateral attack upon the allowable or proration schedules promulgated by said Commission. In connection with such allegations it is alleged that the persistent and fixed policy of the Commission is not to adjust allowables, but to grant a permit or permits to drill an additional well or wells, and in this connection it is not shown that the determination by the Commission that another well should be permitted these defendants on their tract was beyond their jurisdiction, and its findings that such well was necessary to prevent confiscation of property rights is peculiarly within the power of the Commission and this Court cannot substitute its findings or judgment therefor.

VI.

The complaint and amendment thereto show on their face that notice was given and hearing had, and that the Commission found that no injustice would be done by the granting of said permit as an exception to Rule 37, and that same should be granted to prevent confiscation of property. There is no allegation negativing the existence of facts upon which such finding was based. Since the Railroad Commission is vested by law with power to make findings in connection with application for permits as exceptions to Rule 37, its conclusions are binding if there are facts and evidence supporting such conclusions. This Court would be authorized to overturn same only in the event of absence of facts to support the conclusion reached by the Commission, and plaintiffs' complaint and amendment thereto wholly fail to negative the existence of any such facts, and they must therefore be
40 presumed in favor of the order under attack.

VII.

Plaintiffs allege in substance that their damage would be occasioned by the "reasonable probability" that they would be forced to drill additional offset wells at an approximate cost of $10,000 per well; that the drilling by defendants of their No. 2 well would result in drainage from plaintiffs' lease in an amount exceeding five thousand barrels of oil. The complaint and amendment thereto wholly fail to negative the presumption that said well or wells so drilled by them would be economically profitable.

VIII.

As is apparent upon the face of the complaint and amendment to complaint, the gravamen thereof is that plaintiffs seek to substitute by Court decree for the relief already granted these defendants an adjustment of allowables; thereby supplanting the Commission's judgment and decision thereon.

Wherefore, premises considered, these defendants pray that their motion to dismiss for want of equity be sustained; and that the complaint and amendment thereto be dismissed at plaintiffs' cost.

Subject to their motion to dismiss for want of jurisdiction and the foregoing motion to dismiss for want of equity, these defendants make and file this, their first amended answer and reply to plaintiffs' complaint and amendment thereto, and therefor say:

I.

These defendants admit the allegations in Paragraphs I, II, III and IV of the complaint and amendment thereto.

save and except those in Paragraph I (b), I (c) and the allegation in Paragraph III that plaintiffs have drilled wells on their tract in accordance with the existing rules, regulations and orders of the Commission. The allegations of Paragraphs I (b) and I (c) are denied.

As to the allegation that plaintiffs have drilled wells on their tract in accordance with existing rules, regulations and orders of the Commission, these defendants have no knowledge and therefore neither admit nor deny.

II.

These defendants admit that the Railroad Commission has consistently refused to adjust allowables in order to adjust any disparity in density existing between adjacent leases, and has consistently refused to readjust allowables on the basis of acre feet of saturated sand, and admit that the Commission, in order to adjust any disparity existing between adjacent leases, has done so by granting applicants a permit or permits for an additional well or wells. All other allegations of Paragraph V are denied.

III.

These defendants deny all the allegations of Paragraph VI of the amendment to complaint.

IV.

Further answering, if necessary, these defendants say that their said well No. 2 is necessary to prevent drainage of oil from their land and to prevent confiscation of their property and it is necessary to enable them to recover their proportionate share of recoverable oil reserves now

in place under the land covered by their lease. In this connection defendants say that plaintiffs have not applied to the Railroad Commission for relief by the granting of a permit or permits for an additional well or wells on their tract; nor have they applied to said Commission for an adjustment of the allowables on their wells already drilled upin the land covered by their lease, and by reason thereof have failed to exhaust their remedy be-
42 fore said Commission before applying to this Court for relief. They have therefore failed to show that they are without adequate remedy at law, but to the contrary, these defendants say that plaintiffs do have an adequate remedy in that they may apply to said Commission as a matter of right for a permit or permits to drill additional wells, or for a readjustment of allowables on their said wells.

V.

These defendants further say that should plaintiffs drill an additional well or wells upon their lease that same will be economically profitable, and in so doing plaintiffs will not sustain any damage but will prevent the damages complained of.

Wherefore, having fully answered, these defendants pray judgment of the Court that complaint and amendment thereto be dismissed at plaintiffs' cost, and for such other relief at law or in equity to which they may show themselves justly entitled.

(S.) LEE & PORTER,
Attorneys for Defendants.
O. L. Hastings and C. F. Dodson.

Service Address:
501 Glover-Crimm Building,
Longview, Texas.

Certificate.

I, W. Edward Lee, one of the attorneys for defendants, O. L. Hastings and C. F. Dodson, do hereby certify that I have, on this the 13th day of June, 1940, delivered a copy of the foregoing motion and answer to plaintiffs' attorney, the Honorable Dan Moody, and have delivered a copy thereof to Mr. James F. Hart, attorney for the Railroad Commission of Texas.

(S.) W. EDWARD LEE,
Attorney for O. L. Hastings and C. F. Dodson, Defendants.

43 Filed 13th day of June, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

44 (Title Omitted.)

To Said Honorable Court:

Come now the defendants, the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson and G. A. Sadler, Members of the Railroad Commission of Texas, and by leave of Court first had and obtained, file this amendment to their answer in reply to the amendment to plaintiffs' complaint filed on the 13th day of June, 1940, and amend their answer as follows:

I.

Amend the First Defense by striking out the allegations now contained in said paragraph and substituting therefor the following:

The complaint fails to state a claim over which this Honorable Court has jurisdiction, because (1) It appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter of the claim alleged in the complaint, and (2) The complaint does not contain sufficient allegations showing that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00.)

45 II.

Amend Paragraph I under Fourth Defense by striking out the last sentence in defendants' original answer and substituting therefor the following:

Defendants specially deny that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00). Defendants admit the allegations contained in Paragraph I (a) of the complaint with reference to the citizenship and residence of the defendants O. L. Hastings and C. F. Dodson, and the allegations with reference to the residence of the plaintiffs. Defendants deny the remaining allegations in Paragraph I of the complaint.

III.

Amend Paragraph VII under Fourth Defense by adding thereto the following:

Defendants deny that the plaintiffs will suffer drainage by reason of the drilling and production of the Hastings and Dodson well No. 2, and defendants specially deny that the drainage, if any, will be uncompensated drainage, and defendants further specially deny that such drainage, if any, will equal or exceed in amount five thousand barrels of oil, and defendants further specially deny that the dam-

age or injury to the plaintiffs by reason of such drainage, if any, will equal or exceed the sum or value of Three Thousand Dollars ($3000.00).

Wherefore, defendants pray that the foregoing amendments be considered a part of their answer to the complaint, as amended by the plaintiffs as aforesaid, and that upon a hearing this action be dismissed, that defendants go hence with their costs without day, and for such other and further relief, general and special, in law and in equity, as defendants may be justly entitled to receive.

(S.) GERALD C. MANN,
46 Attorney General of Texas.
(S.) JAMES P. HART,
Assistant Attorney General.
(S.) E. R. SIMMONS,
Assistant Attorney General.
(S.) EDGAR CALE,
Assistant Attorney General.
Attorneys for Defendants, Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, and G. A. Sadler.

Austin, Texas.

Filed June 13th, 1940.

AMENDMENT TO PETITION OF PLAINTIFFS SELBY OIL AND GAS COMPANY AND LEWIS PRODUCTION COMPANY.

47 (Title Omitted.)

To the Honorable R. J. McMillan, Judge of Said Court:

Come now the Plaintiffs, Selby Oil & Gas Company and Lewis Production Company, and with consent of the Court

first had and obtained, file this amendment to their original petition, as follows:

I.

Amend Paragraph I(b) to read as follows: The value of the property involved in this suit exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interests and costs, as is more fully shown by facts hereinafter more specifically alleged.

II.

Amend the first sentence of Paragraph III to read as follows: Plaintiffs own jointly, that is, as tenants in common, the oil, gas and mineral leasehold estate in a certain 42.38-acre tract of land in the Mary Cogswell Survey, in Rusk County, Texas, of which estate Tom Bean and Roxie Bean are the grantors, and which lease is known as the Selby Oil & Gas Company and Lewis Production Company Tom Bean 42-acre lease, the lease under which Plaintiffs hold being recorded in Volume 134, page
48 319, of the Deed Records of Rusk County, Texas.

III.

Amend Paragraph VI to read as follows: If the proposed Well No. 2 is drilled and produced by the Defendants Hastings and Dodson, Plaintiffs will, in all reasonable probability, be forced to drill additional offset wells in an attempt to reduce the drainage from Plaintiffs' lease caused by the drilling of the proposed Well No. 2 and the production of oil therefrom. That the expense to Plaintiffs of drilling such additional wells will be approximately Ten Thousand Dollars ($10,000.00) per well; that Plaintiffs now have a sufficient number of wells on their

lease to produce all of the recoverable oil hereunder under reasonable drilling and production regulations, and would not be required to drill any additional wells on their said lease in order to produce the oil thereunder except that the proposed well be drilled and produced, and the drilling of said additional wells to prevent the drainage resulting from the drilling and production of Well No. 2 would be wholly unnecessary except for the drilling and production of said Well No. 2; that even under the existing proration orders Plaintiffs could recover from wells now drilled on their lease the recoverable oil under said lease, except for the drilling of Well No. 2 and the production of oil therefrom; that the expense of drilling such additional wells will be in the nature of damages to the Plaintiffs; that under the existing plan and order of proration enforced by the Railroad Commission, if said Well No. 2 is drilled and produced, the only manner in which the Plaintiffs could then produce oil on the same basis as Defendants Hastings and Dodson would be allowed to produce oil from their lease, would be through the Plaintiffs equalizing the drilling density on their lease by drilling approximately eleven additional wells; that the drilling of such wells, or any additional wells, would be wholly unnecessary to enable Plaintiffs to recover
49 their share of the oil and gas, except for the drilling and production of the proposed Well No. 2. The extent of the drainage which Plaintiffs will suffer from the drilling of the proposed Well No. 2 and the production of oil therefrom cannot be accurately estimated, but Plaintiffs allege that through the drilling of said well and the production of oil therefrom oil will be drained from Plaintiffs' lease in an amount exceeding 5,000 barrels, of the market value of $1.00 per barrel; that the nature of Plaintiffs' damages is irreparable, and Plaintiffs have no adequate remedy at law to protect them from such damages; that Plaintiffs can only be protected from the in-

juries herein alleged by this Court granting the injunctive relief herein prayed for.

Wherefore, Plaintiffs pray as they have heretofore praved in their original petiton.

(S.) E. R. HASTINGS,
(S.) DAN MOODY,
Attorneys for Plaintiffs.

Filed: June 13th, 1940.

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50 ORDER OF THE COURT SUSPENDING TRIAL FOR THE PURPOSE OF LETTING RAILROAD COMMISSION TAKE FURTHER ACTION.

(Title Omitted.)

The above entitled and numbered cause was reached and called for trial on this the 12th day of June, 1940; whereupon came on for hearing the plea in abatement of the Defendants, in connection with which it was made known to the Court that on July 18, 1939, after the filing of this suit on July 17, 1939, Sinclair-Prairie Oil Company filed with the Railroad Commission of Texas a motion for rehearing praying for a review by the Railroad Commission of Texas of the order attacked in this case, and that the Railroad Commission had taken no action on said motion for rehearing; the Court being of the opinion that further proceedings in this case should be suspended and the case passed to allow the Railroad Commission to take action on said pending motion for rehearing;

It is Therefore Ordered by the Court that further proceedings in this trial be suspended, and that the case be

passed for the purpose of allowing the Railroad Commission to act upon said pending motion for rehearing. The Defendants excepted in open Court to this order.

The Clerk is directed to enter in the minutes this order.

51 Made at Austin, Texas, this the 14th day of June, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

Entered: Civ. O. B., Vol. 1, page 122.

Filed: June 14, 1940.

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52 JUDGMENT.

In the United States District Court for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company.

vs. No. 27-C. A.

Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson.

This cause came on to be heard before the Court on the 18th day of July, 1940, by agreement of all parties at San Antonio, Texas, and the Court thereupon heard evidence offered by the plaintiffs; and at the conclusion of such evidence the defendants O. L. Hastings and C. F. Dodson, in open Court, moved the Court to enter judgment in favor of the defendants; and the Court being of the opinion that the motion of said defendants is well taken and that the

plaintiffs have failed to introduce sufficient evidence to justify the Court in granting the relief prayed for against the order of the Railroad Commission of Texas complained of herein.

It is Therefore Ordered, Adjudged and Decreed by the Court that the plaintiffs Selby Oil & Gas Company and Lewis Production Company, take nothing by their suit, that all relief prayed for by said plaintiffs be denied, and that the defendants Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson have and recover of and from the plaintiffs Selby Oil & Gas Company and Lewis Production Company their costs.

Done at San Antonio, Texas, this 18th day of July, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

O. K. as to form:
W. EDWARD LEE.
DAN MOODY.
JAMES P. HART.

Entered: Civ. O. B., Vol. 1, page 132.

53 Filed July 18, 1940.

54 NOTICE OF APPEAL.

In the District Court of the United States for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company, Plaintiffs,

vs. Civil Action No. 27.

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, Defendants.

Notice is hereby given that Selby Oil & Gas Company and Lewis Production Company, Plaintiffs in the above entitled and numbered cause, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on July 18, 1940.

E. R. HASTINGS,

Tulsa, Oklahoma.

DAN MOODY,

Austin, Texas.

By DAN MOODY,

Attorneys for Appellants Selby Oil & Gas Company and Lewis Production Company.

Acknowledgment of Service.

The Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, acting by and through their attorneys of record, acknowledge receipt this day of a copy of Appellants' Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit; and the said Appellees, Railroad Commission of Texas, Lon A. Smith, Ernest O.

Thompson, G. A. Sadler, O. L. Hastings and C. F.
55 Dodson, by and through their attorneys of record, hereby waive all service of notice or citation, this the 12th day of October, 1940.

GERALD C. MANN,
Attorney General of Texas,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler.
W. EDWARD LEE,
Attorney for O. L. Hastings and C. F. Dodson.

Filed: 14th day of October, 1940.

MOTION FOR ORDER DIRECTING THAT ORIGINAL EXHIBITS BE SENT UP AS A PART OF THE RECORD ON APPEAL.

56 (Title Omitted.)

To Honorable R. J. McMillan, Judge of Said Court:

Now come Selby Oil & Gas Company and Lewis Production Company, Plaintiffs in the above entitled and numbered cause, and show to the Court that upon the trial of this case certain exhibits were introduced in evidence, including maps, plats and drawings; that the issues involved in the case can be better presented on appeal if the originals of said exhibits are sent up as a part of the record on appeal.

Wherefore, Plaintiffs pray that the Clerk be directed to forward to the Circuit Court of Appeals for the Fifth

Circuit at New Orleans, Louisiana, as a portion of the record in this case, all original exhibits introduced in evidence upon the trial of this suit.

E. R. HASTINGS,

Tulsa, Oklahoma.

DAN MOODY,

Austin, Texas.

By DAN MOODY,
Attorneys for Selby Oil & Gas Company and Lewis Production Company.

57 Acknowledgment of Service.

Receipt of copy of the foregoing Motion for Order Directing that Original Exhibits Be Set Up As a Part of the Record on Appeal is hereby acknowledged and further service is waived, this the 12th day of October, 1940.

(S.) W. EDWARD LEE,
Attorney for Defendants, O. L. Hastings and C. F. Dodson.

Longview, Texas.

GERALD C. MANN,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler.

Austin, Texas.

Filed: 14th day of October, 1940.

58 APPEAL BOND.

The State of Texas,
County of Travis.

Know All Men By These Presents: That we, Selby Oil & Gas Company and Lewis Production Company, as Principals, and Fidelity and Deposit Company of Maryland, as Surety, are held and firmly bound unto the above named Defendants,. Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Defendants, their successors, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, jointly and severally by these presents.

The condition of this obligation is such that:

Whereas, on the 18th day of July, 1940, in the District Court of the United States for the Western District of Texas, Austin Division, at Austin, Texas (by agreement of the parties the cause was tried before the said Court in San Antonio, Texas), in a suit therein pending on the docket of said Court, styled *Selby Oil & Gas Company and Lewis Production Company vs. Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson*, a judgment was entered and rendered decreeing that plaintiffs recover nothing from defendants, or any of them, and plaintiffs' prayer be, and the same is hereby, in all things denied, all as more fully appears from said judgment on file and of record in the office of the Clerk of the said Court, to which judgment and the record thereof reference is hereby made for a more complete description, and for all purposes, and from which said judgment the Selby Oil & Gas Company and Lewis Production Company have prose-

cuted their appeal to the United States Circuit
59 Court of Appeals for the Fifth Circuit;

Now, therefore, if the said Selby Oil & Gas Company and Lewis Production Company shall prosecute their appeal with effect and secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation is void, otherwise to remain in full force and effect.

Executed this the 12th day of October, 1940.

SELBY OIL & GAS COMPANY,
LEWIS PRODUCTION COMPANY,
By DAN MOODY,
Their Attorney of Record,
Principals.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
(Seal)
By A. N. McCALLUM, JR.,
Attorney-in-fact, Surety.

60 Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know All Men By These Presents: That the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, by B. H. Mercer, Vice-President, and T. N. Ferciot, Jr., Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which reads as follows:

"The President, or First Vice-President, or Second Vice-President, or any one of the Additional Vice-Presidents

specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorney-in-Fact, as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgage, contracts, agreements and policies, and to affix the seal of the Company thereto."

does hereby nominate, constitute and appoint A. N. McCallum, Jr., of Austin, Texas, its true and lawful agent and Attoney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, all bonds or undertakings authorized by the laws of the State of Texas, requiring the approval of any Court in said State of Texas or Judge thereof, or the clerk or other officer empowered by law to approve such bonds; also bonds required by Order or Decree of the United States Courts for said State, and for Trustees and Receivers in Bankruptcy proceedings under the Bankrupt Act of the United States, each in a penalty not to exceed the sum of Fifty Thousand Dollars ($50,000).

II. Bonds each in a penalty not to exceed the sum of Ten Thousand Dollars ($10,000) required of State, County, Township or Municipal Officials in the State of Texas, whether elected or appointed, except those for Treasurers, Deputy Treasurers, Tax Collectors, Deputy Tax Collectors, Sheriffs, Deputy Sheriffs, Police, Constables and Justices of Peace.

61 III. License bonds, each in a penalty not to exceed the sum of Five Thousand Dollars ($5,000)

required by Statute of the State of Texas, or by Ordinance of any Municipality in said State, however, not including Motor Carriers' Bonds, Bus Bonds, Blasting Permit Bonds, Insurance Company Qualifying Bonds, Blue Sky Law Bonds, Warehouse Bonds, Gasoline Tax Bonds, Commission Merchants and Live Stock Bonds, Real Estate and Insurance Brokers Bonds, Collection Agents Bonds, and Industrial Alcohol Bonds.

IV. Bonds and undertakings in favor of the United States of America or any Department thereof, guaranteeing contracts for the construction or erection of buildings, improvements and other works, and contracts for supplies; bonds and undertakings guaranteeing contracts for the construction or erection in the State of Texas of public or private buildings and others works and contracts for supplies; provided, however, that the authority contained in this paragraph does not embrace any bond or undertaking guaranteeing a contract under which the contract price exceeds the sum of Fifty Thousand Dollars ($50,000).

V. Fidelity bonds covering salaried officers and salaried employees of persons, firms, corporations and associations conducting mercantile, manufacturing, financial and other business enterprises, however, not including Blanket Fidelity and Bankers and Brokers Blanket Bonds. The amount of bond on each of such officers and employees not to exceed the sum of Ten Thousand Dollars ($10,000).

VI. This power does not include bonds on behalf of Independent Executors and bonds on behalf of Community Survivors as Administrators of Community Estates.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said

Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

(Seal)

The said Assistant Secretary does hereby certify that the foregoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

In Witness Whereof, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 26th day of January, A. D. 1939.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND.
By B. H. MERCER,
Vice-President.

Attest:
T. N. FERCIOT, JR.,
Assistant Secretary.

62 State of Maryland,
City of Baltimore, ss:

On this 26th day of January, A. D. 1939, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above-named Vice-President and Assistant Secretary of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the

said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(S.) LUCILLE M. WRIGHT,
(Seal) Notary Public.

My Commission Expires May 1, 1939.

Appeal Bond. Filed: 14th day of October, 1940.

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63 ORDER DIRECTING ORIGINAL EXHIBITS TO BE FORWARDED.

(Title Omitted.)

An appeal in the above entitled and numbered cause having been taken by Plaintiffs Selby Oil & Gas Company and Lewis Production Company, and it appearing to the Court upon motion of said Plaintiffs that all of the original exhibits introduced in evidence upon the trial of this cause should, in lieu of copies, be sent to the Appellate Court for inspection;

It is Hereby Ordered that the Clerk of the District Court of the United States for the Western District of Texas, Austin Division, forward to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as a

portion of the record in this case, all of the original exhibits introduced in evidence upon the trial of this action, being Exhibits Nos. 1 to 9, inclusive.

Entered at San Antonio, Texas, this the 15th day of October, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

Approved as to form:
W. EDWARD LEE,
Atty. for O. L. Hastings and
C. F. Dodson.
JAMES P. HART,
Attorney for Railroad Commission of Texas and its members.

Entered: Civ. O. B., Vol. 1, page 146.

64 Filed: October 15, 1940.

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65 STATEMENT OF EVIDENCE.

Court Reporter's Q. & A.

(Title Omitted.)

Be It Remembered that heretofore, to-wit, on the 18th day of July, 1940, came on to be heard the above entitled and numbered cause, before the Hon. Robert J. McMillan, Judge of said Court, sitting (by agreement of all parties

herein) at San Antonio, Texas, the same being the San Antonio Division of the Western District of Texas.

Appearances:

Dan Moody, Esquire, Counsel for Plaintiffs.

James P. Hart, Esquire, Asst. Attorney General of Texas, Counsel for Defendants Railroad Commission of Texas and Commissioners Smith, Thompson and Sadler.

W. Edward Lee, Esquire, Counsel for Defendants Hastings and Dodson.

Whereupon, all preliminary matters having been settled and disposed of, the following evidence was adduced and proceedings had in connection therewith:

66 (During the statement by counsel for plaintiffs of plaintiffs' complaint the following proceedings were had:)

Mr. Moody:

The Lewis Production Company and Selby Oil & Gas Company are foreign corporations; there is a diversity of citizenship.

The Court:

Is the matter of jurisdiction contested, Mr. Lee?

Mr. Lee:

The matter of jurisdiction is contested for failure to state a jurisdictional amount, but not on diversity of citizenship.

Mr. Moody:
That, your honor, you remember was presented at Austin and acted on by the Court?

The Court:
Yes.

(Counsel for plaintiffs thereupon continued his statement of plaintiffs' complaint, and counsel for defendants Hastings and Dodson stated their answer; whereupon the following proceedings were had:)

The Court:
Have you stipulated as to the facts or are you going to introduce evidence?

Mr. Lee:
We can stipulate on practically all of the record facts, and the only oral testimony will be that of the engineers for the particular parties.

The Court:
Can you stipulate it now?

Mr. Moody:
Yes, sir. I introduce this map in evidence.

(The above referred to map was thereupon received in evidence and marked EXHIBIT 1, the same being sent up in the original.)

Mr. Moody:
It is stipulated, your Honor, that the map which the reporter has marked as plaintiffs' Exhibit 1 correctly shows
67 the location of the defendants' Jim Dickson 3.85 acre tract, and that the map also correctly shows the location of all surrounding tracts; it is further

stipulated that this map correctly shows the location of existing wells on the defendants' Hastings and Dodson tract and existing wells on all surrounding tracts and that the acreages in each of the tracts shown on the map, including the defendants' Hastings & Dodson tract and surrounding tracts, are substantially correct. That is right, is it?

Mr. Lee:

Yes.

Mr. Moody:

It is further stipulated that the defendants Hastings and Dodson own a seven-eighths oil & gas leasehold estate on the Jim Dickson 3.85 acres shown on the map, being out of the Mary Cogswell Survey in Rusk County, Texas; that Selby Oil & Gas Company and Lewis Production Company own a seven-eighths oil & gas leasehold estate covering the Tom Bean forty-three acre tract out of the Mary Cogswell Survey, shown on this map; it is further stipulated that Selby Oil & Gas Company is a corporation organized under the laws of the State of Delaware and that Lewis Production Company is a corporation organized under the laws of the State of Pennsylvania; it is further stipulated that the order involved in this case granting Hastings & Dodson a permit to drill a second well on the Hastings & Dodson Jim Dickson 3.85 acre tract was granted by the Railroad Commission on the 5th day of July, 1939; it is stipulated that the order of the Railroad Commission, dated July 5, 1939, granting the defendants Hastings and Dodson a permit to drill a second well on their Jim Dickson 3.85 acre tract in the Mary Cogswell Survey,
68 Rusk County, Texas, is in words and figures as is shown by plaintiffs' Exhibit 2, which I now offer in evidence.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 2, the same being sent up in the original.)

Mr. Moody:
Is that all?

Mr. Lee:
Except that we have further stipulated that any orders of the Railroad Commission or any rules passed by them, copies of them instead of furnishing certified copies may be offered in evidence, subject to any other objection.

Mr. Moody:
That is right.

The Court:
This map here doesn't show any interest of the Lewis Production Company in this lease.

Mr. Moody:
It is stipulated that Lewis Production Company and Selby Oil & Gas Company jointly own that forty-three acre tract, that tract of approximately forty-three acres.

Mr. Lee:
While the Court has that plat before him I want to call your attention to the fact that there are shown on the Hastings & Dodson tract two locations that are not wells,

The Court:
What do you have, only one well?

Mr. Lee:
Yes, sir.

The Court:
And two proposed wells?

Mr. Lee:
Two proposed wells, but only one was granted.

The Court:
How many acres have you there?

Mr. Lee:
3.85 acres in that tract.

The Court:
All right.

Mr. Lee:
And that the wells thereon are shown by the solid dots and the proposed locations are shown by the open dots.

69 The Court:
All right.

Mr. Moody:
I think we further can stipulate that in April, 1939—that the hearing on the application for this permit was heard before the Railroad Commission on April 26, 1939, and that the order granting the permit was entered, as shown by plaintiffs' Exhibit 2, on July 5, 1939, and that in April, 1939, and in July, 1939, the method of prorating the field allowable for the East Texas Oil Field was fixed at approximately 522,000 barrels of oil per producing day. Is that about right, Mr. Hudnall?

Mr. Hudnall:
April, 1939, yes.

Mr. Moody:
522,000 barrels per producing day; that that allowable was distributed among wells on a basis of allowing to each well that could not produce as much as twenty barrels per day the maximum of which it was capable of producing; that there were approximately 450 wells of that class. Is that not right, Mr. Hudnall?

Mr. Hudnall:
About that.

Mr. Moody:
That the balance of the daily field allowable was prorated among wells so that each well that was capable of producing more than twenty barrels per day received a minimum of twenty barrels per day and wells having hourly potentials in excess of 858.65 barrels were allowed to produce 2.32 per cent of their hourly potential, with the result that the maximum allowed to any well was approximately twenty-six barrels of oil per day; that in the actual working of that formula in the distributing of the allowable among the wells approximately ninety-eight per cent was on a per well basis and approximately two per cent was on potential factor. That is as to
70 April and July. Now, there is another question that I believe we have an understanding on, and that is that the Railroad Commission has consistently refused to adjust allowables on the basis of acreage and drilling density?

Mr. Lee:
Yes.

Mr. Moody:
All right.

Mr. Hart:
If the Court please, I want to be sure that I understand what Governor Moody means there. As I understand it he means when a well permit is granted and a protestant asks that if the well is granted the allowable be adjusted between the individual tracts on the basis of density or acreage, that the Commission has refused to do that?

Mr. Moody:

That is what I mean. Where the protestant asks that if the well is granted, then that the allowable for the tract on which the well is to be drilled and the surrounding tracts be adjusted on a density and acreage basis.

Mr. Hart:

In other words, that the Commission enforces the general rule for the field and does not make special adjustments on the basis of density with reference to particular tracts?

Mr. Moody:

That is right.

Mr. Lee:

Can we further agree, Governor, that these wells are so located upon the structure that the tract upon which it is granted and the surrounding and adjoining tracts didn't, at that time, get any advantage of the two per cent on allowable, but that it was on a flat per well basis as affecting this immediate area under the order existing during April and July of 1939?

71 Mr. Moody:

Yes, that all wells, the wells shown on the defendants' Hastings & Dodson tract and all wells shown on tracts surrounding it, under the proration formula existing in April and July, 1939, each got the twenty barrel per well allowable, no more and no less.

The Court:

All right. Have you any oral evidence?

Mr. Moody:

Yes, sir, and I have some record evidence here which I would like to offer, your Honor. I offer in evidence a certificate of C. F. Petet, secretary of the Railroad Com-

mission of Texas, showing the allowable in April and July, 1939, for the Tidewater Associated Oil Company's S. S. Laird 17.82 acre lease to be sixty barrels, which was then a lease with three wells—

Mr. Lee:
Isn't that already covered by the proof that is already evidence?

The Court:
This is a trial before the Court; it doesn't make any difference.

Mr. Moody:
I will just offer this certificate.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 3, the same being sent up in the original.)

Mr. Moody:
I believe when I said we stipulated that that map correctly shows the location and number of wells on each of the leases shown thereon, and the map is plaintiffs' Exhibit 1, I think I stated that as of the present time, but that is as of April, 1939, your Honor.

Mr. Lee:
That is right.

72 Mr. Moody:
I now offer in evidence a certificate of the State Comptroller of Public Accounts showing the production reported to the comptroller by Hastings & Dodson from the Hastings & Dodson Jim Dickson 3.85 acre lease in Rusk County from September, 1933, up to April, 1940, and I ask the reporter to mark that plaintiffs' Exhibit 4.

Mr. Lee:

Your Honor, we object to the inclusion of any portion of the production after April of 1939, the date on which the Railroad Commission acted, because we think the Court will be restricted in its deliberation as to conditions as they existed at that time and not according to changed conditions, because as to those the Railroad Commission hasn't yet acted.

The Court:

Overrule the objection.

Mr. Lee:

Note the exception.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 4, the same being sent up in the original.)

Mr. Moody:

I next offer in evidence a certificate of the comptroller showing the production from June, 1931, to April, 1940, from the Sinclair Prairie Oil & Gas Company's Major Kenedy B lease; also showing production from June 30, 1931, to date from the Tidewater Oil Company's S. S. Laird lease, and also showing the production from September, 1932, to date from the National Oil & Grease Company's—

The Court:

What do you consider to be the significance of that?

Mr. Moody?

It shows, your Honor, the amount of oil that they had produced up to the time the permit was granted—to date, rather—and also up to the time the permit was
73 granted, from these various surrounding leases so as to show whether or not there was any justi-

fication for the Railroad Commission order granting this permit to prevent confiscation of property. That is the reason assigned by the Commission for it. Also showing the production from the Overton Refining Company from their Dave Wade lease from April, 1932, to date, and the production from the Weaver-Crim Corporation's Francis Bean B lease from December 31, 1932, to the date of April, 1940, and the production from the Selby Oil & Gas Company's and Lewis Production Company's Tom Bean lease from September, 1933, to April, 1940, and I ask the reporter to mark this certificate as plaintiffs' Exhibit 5.

Mr. Lee:

We have the same objection to all parts of those certificates from and after June 1, 1939.

The Court:

All right.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 5, the same being sent up in the original.)

Mr. Moody:

I also offer in evidence from the file of the Railroad Commission the report of J. D. Copeland, the examiner who held the hearing on this application. This is a file of the Railroad Commission. I wonder if we might detach it, Mr. Hart, and let the reporter make a copy of it and return it to you?

Mr. Hart:

All right. However, if it is all right, I can have a copy made.

Mr. Moody:

That is all right, and it will be plaintiffs' Exhibit 6.

74 (The above referred to document was thereupon received in evidence and marked EXHIBIT 6; such original document being withdrawn and a copy thereof led in this cause on July 20, 1940, the same being sent up as an original exhibit.)

Mr. Moody:

It was well No. 2 that was granted, your Honor. We also offer in evidence as plaintiffs' Exhibit 7 the order of the Railroad Commission dated June 17, 1940, overruling Sinclair-Prairie Oil Company's motion for rehearing on the order granting the permit.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 7, the same being sent up in the original.)

Mr. Moody:

I wonder if we couldn't agree that Mr. Parker, who is called as an expert by the plaintiff—

The Court:

I have known Mr. Parker for years, and I should think you could stipulate that he is qualified.

Mr. Moody:

I was going to propose they state Mr. Parker is qualified.

Mr. Lee:

It will be admitted he is qualified.

Mr. Moody:

And I will stipulate that Mr. Hudnall is qualified as a petroleum engineer.

R. D. PARKER, a witness for the Plaintiffs, was sworn and testified as follows:

Direct Examination.

Questions by Mr. Moody:

Q. Please state your name.

A. R. D. Parker.

75 Q. Where do you live, Mr. Parker?

A. Austin, Texas.

Q. Mr. Parker, have you made a study of the East Texas field?

A. I have.

Q. By the East Texas field I mean the East Texas Oil Field, of course. At my request have you made a study of the Hastings & Dodson Jim Dickson 3.85 acre lease out of the Mary Cogswell Survey in Rusk County, Texas, and the leases surrounding that Hastings & Dodson lease?

A. Yes, sir, I have.

Q. Mr. Parker, what are the facts with respect to whether or not the sand conditions in the producing horizon underneath the Hastings & Dodson lease and underneath the leases immediately adjacent to it are substantially the same throughout that area of the field?

A. They are substantially the same except that the thickness, there is some slight variation due to thickness of the sand as you move from east to west; and as to that fact I use an average thickness for the area which I think is representative.

Q. In your calculations that you are going to testify about you have used an average thickness, is that right?

A. Yes, sir.

Q. What part of the East Texas Oil Field is this particular area of land in?

A. It is in the eastern portion of what is called the fairway or central or most productive and best portion of the field.

Q. Have you made calculations to show the recoverable oil under the Hastings & Dodson lease and the
76 leases surrounding the Hastings & Dodson lease?

A. Yes, sir, I have. I have made an estimate of the probable future recovery of oil in that area.

Q. Please state to the Court how you made those calculations.

Mr. Lee:

We will object unless the witness shows as to what time he confined those calculations, whether as of this time or as of the time the permit was granted.

The Court:

What difference does it make?

Mr. Lee:

We think it makes this difference: that at the time the Railroad Commission acted they were confronted with certain conditions that they couldn't be passing on now because we are reviewing an order made in July.

The Court:

If their action was incorrect we would be entitled to ascertain it by the facts as they exist now. It isn't just a question as to whether they guessed right or not at that time. Overrule the objection.

Mr. Lee:

Note our exception.

Q. Please state to the Court how you made those calculations.

A. The estimate was made on what is known as the volumetric method, which takes into account the porosity of the sand, the thickness of the sand, the probable recovery factor and the shrinkage due to the difference in

volume of oil in the sand and the pressures and temperatures existing in the sand and the pressures and temperatures existing on the surface or under atmospheric conditions.

Q. Is that a method of calculating prospective recoveries that is accepted and followed by petroleum engineers generally?

A. It is.

77 Q. In calculating prospective recoveries in the East Texas field?

A. It is.

Q What did you figure to be the acreage of the Hastings & Dodson lease and the leases adjacent thereto?

A. You mean the total for the entire area?

Q. Yes, sir.

A. 149.8 acres.

Q. What did you calculate to be the prospective—or the amount of recoverable oil remaining under these leases?

A. 3,349,827 barrels.

Q. Did you figure that as of what date, do you remember?

A. Well, the conditions prevailing at the time the hearing was held.

Q. You took those figures as of the time the hearing, that is, April, 1939?

A. Yes, sir.

Q. Now, Mr. Parker, how many wells did you find to be on the 149.8 acres?

A. Thirty-eight.

Q. Their daily allowable at the time of the hearing was 760 barrels per day, I believe?

A. That is correct.

Q. What did you calculate would be the period of years required to produce the oil, or your estimate of the recoverable oil, under this 149.8 acres of land?

A. Approximately twelve years.

Q. Did you undertake to figure on the basis of acreage the percentage of the estimated recoverable oil
78 under the tracts—that belonged to those tracts, respectively?

A. Yes, sir.

Q. Have you made a tabulation of those figures?

A. I have.

Q. Do you have it there in your hand?

A. I do.

Q. Will you read that tabulation, please?

A. The fair ratable share of the total production of 3,349,827 barrels going to the Tidewater Laird 17.8 acres would be 307,959 barrels; that going to the National Oil & Grease Company's Dickenson lease, 14½ acres, would amount to 323,328; that going to the Selby Oil & Gas Company Bean lease, the 43 acres, amounts to 961,400 barrels; that going to the Weaver-Crim Bean, 16.7 acres—

The Court:

Where is that tract?

Mr. Moody:

Just below the highway, your Honor; Weaver-Crim, a triangular piece.

A. South of the Selby tract.

The Court:

Go ahead, I see it.

A. That going to the Weaver-Crim Bean lease, of 16.7 acres, would be 373,171 barrels; that going to the Sinclair Kenedy and Overton Refining Company Wade, considered jointly, amounting to 54 acres, would be 1,207,278 barrels; that going to the Hastings & Dodson lease, of 3.85 acres, amounts to 86,091 barrels.

Q. Now, in answering my question you stated there certain amounts as going to leases that you called. Is that based on the percentage of the recoverable oil
79 that those leases would have, figuring the relation which their respective acreage bears to the total acreage in all the leases?

A. That is correct.

Q. That is the way you arrive at those figures?

A. That is correct.

Q. Now, if you calculate two wells on the Hastings & Dodson Dickson lease, what will be the effect as to its annual allowable as compared with the annual allowable of the other leases in the 149 acres?

A. Well, it will be doubled.

Q. It will be double the present allowable?

A. It will be double the present allowable.

Q. Have you prepared a table that would show what would be the annual allowable on a basis of twenty barrels per well per day to these various leases?

A. Yes, sir.

Q. Assuming that a second well had been drilled on the Hastings & Dodson lease?

A. That is correct.

Q. Is that shown on page 3 of your report?

A. It is.

Q. Do you have two copies of that report?

A. Yes, sir.

Mr Moody:

If I may, I will give the Court a copy and let these gentlemen have a copy and question him from that copy.

The Court:

Are you going into detail with this witness? I think I pretty generally understand what this is about.

80 Mr. Moody:

I won't go into great detail.

Q. Mr. Parker, have you made a calculation as to what amount of oil would be drained from the Selby Oil & Gas Company's Bean lease, based upon your calculation of the recoverable oil underneath the 149 acres of land, and on the assumption that the 20 barrel allowable per well per day will continue, and based upon the assumption that a second well is drilled on Hastings & Dodson tract of land?

A. Yes, sir.

Q. And have you also made like calculations for each of the leases adjoining the Hastings & Dodson lease?

A. I have. It shows the gains and losses.

Q. Do you have a tabulation of that?

A. I have.

Q. Is that the tabulation shown at the bottom of page 3 of your report?

A. That is correct.

Q. What about the Tidewater, will it lose or gain?

A. The Tidewater will lose 133,505 barrels.

Q. What about the National Oil & Grease Company with respect to its Dickenson lease, will it lose or gain?

A. It gained 28,679.

Q. What about the Selby Oil & Gas Company?

A. It would lose 79,881.

Mr. Hart:

If the Court please, we wish to object to that question and the answer for the reason that there is no separation of the drainage between the two wells which will be on the Hastings & Dodson lease. As I understand, the measure of damages, if any, will have to be the drainage caused by the additional well, and there is no separation of the drainage of one well from the other; we therefore believe this evidence is immaterial.

81

The Court:

Of course Mr. Parker knows a lot more about it than I do, but I have dealt with the East Texas field a good

deal, and the Selby people have about eight or nine wells on their tract and the Weaver-Crim people have three wells down there on their tract and they offset this Hastings & Dodson tract, and the National Oil & Grease Company has four wells on their tract, and it is all common reservoir there, the sand has the same porosity and permeability and practically the same thickness. It seems to me they drain one another. I can't see much significance in one additional well being in there.

Mr. Moody:

Well, your Honor, I think we have a calculation that will take care of Mr. Hart's objection and it will take just a moment to put it in.

The Court:

All right.

Q. What do you calculate to be the result on the Weaver-Crim tract, whether or not it will gain or lose oil if a second well is drilled?

A. Weaver-Crim will lose 20,564 barrels.

Q. What about the Sinclair-Prairie and Overton Refining Company Wade lease with respect to whether that would gain or lose?

A. It would gain 115,000 barrels.

82 Mr. Lee:

We think that is immaterial because the only question here is the relative rights of the two litigants rather than taking in the whole area.

The Court:

Isn't the question here whether the Court should revise the discretionary action of the Railroad Commission?

Mr. Lee:
I think that is the sole question.

The Court:
Are the facts conflicting?

Mr. Lee:
What?

The Court:
I did that once and I got reversed doing it.

Mr. Moody:
Your Honor, I think there are some other questions in this case and I think they will develop.

The Court:
All right.

Mr. Moody:
May I have an answer to the last question?

The Court:
Yes, sir.

A. I think I answered it, 115,000 barrels.

Q. Hastings & Dodson, what would be the effect if they are allowed two wells, with respect to how much they would recover compared to the percentage of the oil under their lease?

A. They would gain 90,205 barrels.

Q. Mr. Parker, have you prepared in typewritten form analysis of your study of this question?

A. Yes, sir.

Mr. Moody:
I am going to give counsel for the defendants a copy of it, and I would like to put it in evidence as a more simple way of stating it than by asking questions about it.

83 Q. Mr. Parker, have you calculated the density of the several leases, of the Hastings & Dodson lease and the several leases surrounding it, on the basis of one well to the Hastings & Dodson 3.85 acre lease?

A. I have.

Q. You have?

A. Yes, sir.

Q. What is the density of the Selby Oil & Gas Company and Lewis Production Company lease?

A. One well to 4.34 acres.

Q. What is the density of the Weaver-Crim lease?

A. One well to 4.79 acres.

Q. What is the density of the Tidewater Laird lease?

A. One well to 3.36.

Q. The Tidewater Laird?

A. Yes, sir.

Q. How much?

A. One well to 3.36—no, that is wrong.

The Court:

What will the additional well on the Hastings & Dodson lease make it?

Mr. Moody:

It would make it 1.925.

A. That Tidewater Laird should be .891.

Q. It is 17.82 acres in the Tidewater Laird lease, I believe, isn't it? Yes. And three wells on there would be 5.94, would it not?

A. Yes, sir, that is correct.

Q. What is the density of drilling on the National Oil & Grease Company Dickenson lease?

84 A. One well to 5.61 acres.

Q. On the Sinclair-Prairie Major Kenedy?

A. One well to 5.38.

Q. The density of the Crosby-Overton Refining Company two acre lease?

A. One well to 10.

Q. One well to what?

A. 10.

The Court:

10 acres.

Q. One well to two acres?

A. One well to two acres, sure.

Q. Have you calculated the average density of these leases surrounding the Hastings & Dodson lease?

A. The average density is one well to 4.93 acres.

Q. With one well the Hastings & Dodson lease has a density of one well to 3.85 acres?

A. That is right.

Q. Now, Mr. Parker, based upon the comptroller's certificates as to the amount of oil produced from the several leases that have been referred to in these last questions I have asked, have you calculated the recovery of these several leases per acre of the lease and do you have a tabulation of it?

A. Governor, I beg your pardon, I read from the wrong statement here. May I read the densities as you asked them?

Q. Yes, if you made a mistake please correct it.

A. I was reading from the wrong column. The density on the Selby-Lewis tract, the 43 acres for 10 wells
85 on it is one well to 4.3 acres; the density on the Weaver-Crim tract of 16.7 acres with four wells on it is 4.175; the density on the Tidewater Laird tract with 17.82 acres and three wells in 5.94; the density on the National Oil & Grease Company Dickenson 14.5 acres with four wells is 3.62; the density on the Sinclair Major Kenedy tract of 52 acres with fourteen wells is 3.70; the

density on the Overton Refining Company Wade with two acres with one well is one well to two acres.

The Court:
Where is that tract?

Mr. Moody:
Right down below in the corner you will see it, cut in in the Sinclair lease just west of the road shown on the map, your Honor.

The Court:
All right.

A. The average density of all of those tracts is one well to 4.05 acres, and the density of the Hastings & Dodson Dickson lease of 3.85 acres with one well would be one well to 3.85 acres, and two wells would be one well to 1.92 acres.

Q. All right, at present the Hastings & Dodson lease with one well is drilled to a greater density than any of the surrounding leases with the exception of the Sinclair lease, which is 3.7 acres per well as against 3.85 acres per well on the Hastings & Dodson, and the Overton Refining Company lease, which is two acres per well as against 3.85 on the Hastings & Dodson, is that right?

A. That is correct.

Mr. Lee:
There is one more, National Oil & Grease.

Q. National Oil & Grease Company, yes, its density is 3.62 acres per well as against Hastings & Dodson
86 of 3.85?

A. That is correct.

Q. Have you calculated, from the reports of the comptroller which have been offered in evidence here, as to

the amount of production from these seven leases, the recovery per acre from each of these leases, respectively, up to April, 1940?

The Court:
What is the materiality of that, counsel?

Mr. Moody:
Your Honor, the Railroad Commission granted this permit on the basis that it was necessary to prevent the confiscation of property. The purpose is to show that at this time the Hastings & Dodson with the one well on it has recovered more oil per acre than the average of the surrounding area and more oil per acre than any surrounding lease with the exception of the Tidewater, and substantially the same amount as the Tidewater, and then the other one that has exceeded Hastings & Dodson is the Overton Refining Company.

The Court:
Haven't these three-judge Federal Courts consistently held we can't adjust matters that took place in the past?

Mr. Moody:
I think that is correct, your Honor, but I am not asking an adjustment of matters that took place in the past. If your Honor will recall, in the report of the examiner who made the report on this hearing to the Railroad Commission he stated testimony was that on the spacing arrangement there is no net loss of oil on applicant's lease. This was brought out on cross examination. Now, the Railroad Commission has granted the permit to prevent the confiscation of property.

87 The Court:
I don't know what the record will eventually show in this case, but I know in many other cases I have

tried they have held with regard to that fairway that as fast as you take the oil out other oil comes in.

Mr. Moody:
That is true.

The Court:
And you don't lose any oil; maybe you lose a little pressure.

Mr. Moody:
Your Honor, the point that I have in mind is to show that there is no substantial basis in fact to support the Railroad Commission order. Now, the Railroad Commission has made an order here and they have stated their reasons for granting this permit—

The Court:
I don't want to curtail you, but it doesn't seem to me it makes much difference as to what they produced in the past because they probably have just as much oil under there now as they had to start with.

Mr. Moody:
The purpose of offering the testimony is to show there is—

The Court:
Do you think it is material to go into the record?

Mr. Moody:
Yes, sir, I think it is.

The Court:
Will you curtail it?

Mr. Moody:

Yes, sir, it will be very brief. I guess I may lead him?

Mr. Lee:

Go ahead.

Q. The Selby Oil & Gas Company has produced per acre up to April 1940—or is that April, 1939?

A. 1940.

88 Q. 9,502.73 barrels, is that correct?

A. That is correct.

Q. Weaver-Crim 10,795.28 barrels?

A. That is correct.

Q. Tidewater Laird 11,594.04 barrels per acre?

A. That is correct.

Q. National Oil & Grease Company Dickenson lease 12,370.39 barrels per acre?

A. That is correct.

Q. Sinclair Major Kenedy lease 10,760.44 barrels?

A. That is correct.

Q. The Overton Refining Company Wade lease 31,860.57 barrels per acre?

A. That is correct.

Q. Do you know what the average production per acre from that list of leases is?

A. The average for all you have named?

Q. Yes, sir.

A. 10,946 barrels—44 barrels.

Q. Now, the production from the Hastings & Dodson lease up to April, 1940, per acre was 12,270.12 barrels, is that correct?

A. That is correct.

Q. Now, Mr. Parker, those figures show, do they not, that the only two leases in the area that have produced more per acre than the Hastings & Dodson lease is the National Oil & Grease Company lease, which has produced a little more than 100 barrels more per acre?

A. Yes, sir.

89 Q. And then the Overton Refining Company lease?

A. They produced 31,860 barrels.

Q. Hastings & Dodson have produced more per acre than the average of the surrounding area, is that not correct?

A. That is correct.

Q. Have you made a tabulation showing it based on a twenty barrel allowable? Have you made a tabulation showing the allowable per acre for the Hastings & Dodson lease and the surrounding leases?

A. Yes, sir.

Q. That is as of April and July, 1939?

A. That is right.

Q. Is that of the Tidewater 3.36 barrels per acre per day?

A. That is correct.

Q. National Oil & Grease Company's lease 5.51 barrels per acre per day?

A. That is correct.

Q. Selby Oil & Gas Company and Lewis Production Company's lease 4.34 barrels per acre per day?

A. That is correct.

Q. The Weaver-Crim lease 4.79 barrels per acre per day?

A. That is correct.

Q. Sinclair-Prairie 5.38 barrels per acre per day?

A. That is correct.

Q. Overton Refining Company 10 barrels per acre per day?

A. That is correct.

Q. Now, the average of those several leases was 4.93 barrels per acre per day?

90 A. Yes, sir.

Q. The Hastings & Dodson lease was 5.19 barrels per day per acre with one well, is that correct?

A. That is correct.

Q. Two wells would be 10.38 barrels per acre per day, would it not, if the second well was drilled?

A. 9.

Q. Twice 5.19 would be 10.38?

A. That is right, 10.38.

Q. In your opinion does the Selby Oil & Gas Company lease at this time have a sufficient number of wells on it to produce its fair share of the recoverable oil?

A. In my opinion it has.

Q. How about the Weaver-Crim lease?

A. It has.

Q. How about the Sinclair lease?

A. It has.

Q. How about the Overton Refining Company lease?

A. It has.

Q. How about the Tidewater Oil Company lease?

A. It has.

Q. How about the National Oil & Grease Company lease?

A. It has.

Q. How about the Hastings & Dodson lease with one well on it?

A. It has.

Q. In your opinion would Hastings & Dodson, with one well on that lease, during the life of the field and on a basis of twenty barrels per day as was in force
91 in April and July, 1939, twenty barrels per day per well, recover, in the life of the field, an amount of oil substantially equivalent to the recoverable oil originally in place under the Hastings & Dodson lease and in place under that lease in April and in July, 1939?

A. In my opinion it would.

Q. With its one well it produces more oil per acre per day—or was in April and July, 1939, with one well, it was producing more oil per acre per day than the average of the leases surrounding it, was it not?

A. That is correct.

Q. Now, it is your opinion, is it, that if the Hastings & Dodson are allowed to drill a second well on their 3.85 acre lease that that lease will have then a production and drainage advantage over each and every lease surrounding it?

A In my opinion it would.

Q. Including the Overton Refining Company lease?

A. Yes, sir.

Q. Based upon your study of the facts with regard to these several leases, what is your opinion as to whether or not in April, 1939, and July, 1939, the Hastings & Dodson lease was or was not suffering drainage of oil to other leases that would ultimately result in Hastings & Dodson being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil then in place under that lease?

A. In my opinion it wasn't suffering that sort of drainage.

The Court:

What did you say?

A. It was not suffering that sort of drainage.

92 Q. Is it or not your opinion that if the second well is drilled on this Hastings & Dodson tract that the Hastings & Dodson lease will be allowed to recover more oil than the amount of recoverable oil originally in place under that lease?

A. Yes, sir.

Q. What is your opinion as to whether or not the drilling and production of a second well on this lease will result in production from the Hastings & Dodson lease of more oil than the amount of recoverable oil under that lease in April, 1939, and July, 1939?

A. With the two wells it would, yes, sir.

Q. Now, when you talk about recoverable oil originally in place and in place now under the lease, or at any given

date, do you take into account there, do you attempt to estimate the amount of oil that migrates to a lease by reason of the physical structure of the East Texas field?

A. Yes, sir.

Q. So, then, it is your opinion that if this second well is drilled Hastings & Dodson will be given a decided advantage over the surrounding leases in the production of oil?

A. Yes, sir. There is regional migration from west to east, Governor, but the disparity in the recoveries here per acre as between the Hastings & Dodson lease and surrounding leases would more than take care of that. In other words, when the oil came into the area the Hastings & Dodson lease would get the advantage and get more oil than it otherwise would, relatively more than it otherwise would.

93 Q. All right. Now, this advantage that Hastings & Dodson will get in production of oil by having two wells, is that the cause of the Selby lease and other leases you mentioned earlier in your testimony?

A. Yes, sir.

Cross Examination.

Questions by Mr. Lee:

Q. Mr. Parker, do you subscribe to the now generally accepted theory of the migration of the oil from the west to the east in this field?

A. Yes, sir, I think that is true.

Q. Then under that theory as oil is taken from the reservoir immediately under these wells it is replaced by oil moving in from the west, isn't it?

A. It is unless the water was encroached sufficiently—

Q. Is this area producing any water at this time?

A. There are some wells in this area that are producing water, Mr. Lee.

Q. What wells, please, sir.

A. I don't believe I made a memorandum. I ascertained that fact from the Railroad Commission water report as April 1st, which is the nearest water report—April 1, 1939—which is the water report nearest the date on which this hearing was held. There are a number of wells in the area making water now, varying in percentage. We don't know how much of the area has been taken up by water or how much of the sand volume has been taken up by water.

Q. All the wells in this area are on the pump, aren't they?

94 A. Yes, sir.

Q. And have been for sometime?

A. Yes, sir, that is correct.

Q. How close is this Dickenson No. 4 from the Hastings & Dodson line?

A. It is very close to the line.

Q. About 80 feet, isn't it?

A. The National Oil & Grease?

Q. Yes.

A. Dickenson?

Q. Yes. It shows to be about 80 feet on that plat, doesn't it?

A. Probably so.

Q. Hastings & Dodson doesn't have a well that close to their line, do they?

A. No, sir, but the density makes the difference.

Q. How close is Weaver-Crim's well to that lease?

A. It is approximately the distance that the National Oil & Grease Dickenson No. 4 is, about 80 feet or 100.

Q. Then Weaver-Crim is closer to Hastings & Dodson than Hastings & Dodson is to Weaver-Crim, aren't they?

A. Yes, sir.

Q. Then at least two wells are closer to Hastings & Dodson than they are to anybody else?

A. That is right.

Q. Now, you have prepared a map, Mr. Parker, on your usual eight times density theory that you proceed on in the State Courts generally?

A. Yes, sir.

Q. Will you let me see that, please, sir?

95 A. I don't have it.

Mr. Lee:

Don't you have one, Governor?

Mr. Moody:

No, I haven't. I have this map.

A. Mr. Lee, I think the figures I have conform to those Mr. Hudnall has.

Mr. Lee:

Mr. Hudnall doesn't have his map with him, but I thought I saw one.

Mr. Moody:

I think I made that thing.

A. That map is not one that I had anything to do with.

Mr. Lee:

This will serve as a little guidance for me, anyway.

Q. If you draw an eight times circular area, Mr. Parker, from the center of the Hastings & Dodson tract you would have eight times the area of the Hastings & Dodson tract within that circle, wouldn't you?

A. Yes, sir.

Q. How many wells would you embrace within that circular eight times area?

A. Well, under the comparison I made it was in the form of a square instead of a circle, but I believe you

would have the same number of wells in the circle as in the square. The figure I have is eleven wells.

Q. If you lay off an eight times area around the Hastings & Dodson lease, either circular, in a square or a trapezoid it would include in this instance the same number of wells, wouldn't it?

A. I think that is true. I haven't tested it out.

Q. It would include eleven wells, wouldn't it?

96 A. Yes, sir.

Q. Exclusive of the Hastings & Dodson well?

A. That is correct.

Q. So that within the eight times area at that time it placed the Hastings & Dodson well at a thirty-seven and one-half per cent density disadvantage, didn't it?

A. That is correct, within those limits.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Parker, if the Selby Oil & Gas Company attempted to drill, or the Railroad Commission permits Selby Oil & Gas Company to drill another well on its lease in an attempt to reduce the drainage you have testified would take place from the drilling and production of the second well on the Hastings & Dodson tract, what is your opinion with respect to whether or not such well would completely prevent the drainage or only reduce what would otherwise be the extent of the drainage because of the second well on the Hastings & Dodson lease?

A. No, sir, that well would not make up the difference.

Q. You mean by that it would not prevent, it would only reduce?

A. That is right.

Q. What would it cost to drill another well, approximately, and equip it on the Selby Oil & Gas Company lease?

Mr. Lee:
We object to that.

The Court:
I don't see that there is any materiality to it.

97 Mr. Moody:
It is pleaded as an element of damage. He has testified that the Selby Oil & Gas Company now has all the wells that are necessary.

The Court:
Overrule the objection.

Mr. Lee:
Note our exception.

Q. What would be the approximate cost of drilling and equipping another well on the Selby Oil & Gas Company lease, if you know?

A. The price varies according to the material you used, but I would say ten or twelve thousand dollars.

Mr. Hart:
If the Court please, we want to save our same objection, that that is an immaterial question with reference to the issues.

The Court:
I thought that might be material to come in on a question of jurisdiction.

Mr. Hart:
We want to object because it is immaterial even on th issue.

The Court:
All right.

Q. Mr. Parker, the amount of oil that you have testified that would, in your opinion, be drained from the Selby Oil & Gas Company lease by reason of the drilling and production of the second well on the Hastings & Dodson lease, would that amount of oil lost by drainage over the years, that is calculating its value as of this time, exceed in amount the sum of $3,000.00?

A. It would, materially.

Q. Sir?

A. It would materially exceed it.

Q. It would run up to several times $3,000.00?

A. Yes, sir.

98 Q. That is if you undertook to fix its present value, although the oil is to be lost over a period of ten or fifteen years?

A. That is correct. You mean by present value the discounted future value?

Q. Yes, sir.

A. Yes, sir.

Q. What is the price of oil now in the East Texas Oil Field?

A. $1.10.

Q. Is that its reasonable market value over there?

A. Yes, sir.

Re-Cross Examination.

Questions by Mr. Lee:

Q. Mr. Parker, how much oil will this No. 2 well of Hastings & Dodson drain from the Selby Oil & Gas Company lease over the period of the field's life?

A. It will drain its proportionate share.

Q. How much?

A. I haven't worked that out. I dealt in the leases as a whole, Mr. Lee.

Q. All right. Now, you are litigating here with respect to the damage you say it is going to do your client from

this one well. How much oil will this second well of Hastings & Dodson's, the one here involved, drain from Selby Oil & Gas Company and Lewis Production Company's lease over the life of the field?

A. Well, on the basis of the study I made, two wells would drain approximately 60,000, and this well would drain half that amount or 30,000 barrels.

99 Q. How many?

Mr. Moody:

He said 30,000 barrels.

Q. Will it drain all that from the Selby Oil & Gas Company lease?

A. Yes, sir.

Q. What are you going to do with your west-east migration theory then?

A. Well, you would increase the drainage, Mr. Lee, by increasing the quantity of oil that moves into the area. The figures that I made on future recovery were in a measure conservative, I think, but if you increase the amount of oil that comes into the area and the same number of wells remain in the area you have relatively the same proportion of oil moving as I have indicated moves in my study that I have filed here with the Court.

Q. All right, in your study here you have included all the adjoining and surrouding leases?

A. That is correct.

Q. And you have said that this one additional well of Hastings & Dodson's will get about 60,000 barrels more oil there and you say that half of it will be taken by that well and from your tract. Why don't you allocate that among the adjoining leases? Won't they get some of that from their neighbors or will it just beat a path to your door and take at all from your tract?

A. Do you have a map there?

Q. Yes, sir.

A. You will find that the losses come from
100 the Weaver-Crim and the Selby Oil & Gas and the gains come from the leases immediately east of them; and my assumption in the allocation of the drainage as between leases was that the National Oil & Grease Company's tract and the Hastings & Dodson tract would take from the Selby Oil & Gas Company tract in proportion to their gains.

Q. Then how much are you saying that the National Oil & Grease Company tract is going to take from you?

A. The figures stated in my report here.

Q. All right, what does that report show.

A. It would be twenty-four and a fraction per cent, or 19,267 barrels.

Q. How many?

A. 19,267 barrels

Q. What page is that shown on?

A. Page 5.

Q. And Hastings & Dodson are going to take from you 60,000 barrels?

A. That is right.

Q. Well, as Hastings & Dodson produce twenty barrels per day from their wells, and under the west-east theory of migration it is replaced as fast as it comes in there, how are they going to be draining that oil from you when you lay to the east of the Hastings & Dodson?

A Well, it doesn't make any difference whether oil is in place or there is any migration or not, there is a certain amount of oil that comes into the Hastings & Dodson and surrounding leases, and if the Hast-
101 ings & Dodson lease has an advantage over the surrounding leases it is going to get more oil because it has more relative wells under the given allowable.

Q. Is there as much oil in place under those leases as there was when the field was originally discovered?

A. In my estimate I discounted it. I took about sixty per cent instead of taking the one hundred per cent of effective sand.

Q. You think there is about sixty per cent as much now?

A. No, I hardly think so, but I took it on that basis to be conservative. As a matter of fact, I think the drainage would be more than the figures we have here.

Q. Then under that theory the wells are going to produce in there about thirty years, aren't they? Isn't that what you say?

A. No, I said this is for approximately a twelve year period. The probabilities are the field will be producing longer than twelve years.

Q. On a twelve year basis, then, at that time all the oil that is now under Hastings & Dodson's tract would have migrated over onto the Selby tract to the east, wouldn't it?

A. No, I can't see it that way.

Q. Well, how much of Hastings & Dodson's oil is going to migrate to Selby Oil & Gas Company's tract?

A. On the basis of this study, approximately seventy-five per cent of it.

Q. And they in turn are going to have to get theirs from migration from the west?

A. That is about seventy-five per cent.

Q. They are going to have to get theirs, in
102 turn, from somebody else and not Selby, aren't they?

A. Yes, I think that would be true.

Q. There won't be any of Selby's oil migrating westward to the Hastings & Dodson tract, will there?

A. Probably not.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Parker, do you know what was the average density of drilling in the East Texas field in April, 1940?

A. Slightly in excess of one well to five acres.

Q. About one well to five acres?

A. Yes, sir.

Q. Hastings & Dodson, then, already had their lease drilled below the average density of the entire field?

A. Yes, sir.

Q. And this well would give—

The Court:

They only have one well?

Mr. Moody:

Yes, sir.

Q. With two wells their density would be approximately two and a half times as great as the average density of the field?

A. Approximately, yes, sir.

Re-Cross Examination.

Questions by Mr. Hart:

Q. Mr. Parker, did you estimate how much oil an additional well drilled on the Hastings & Dodson tract would produce from there on?

A. No, sir.

Q. You didn't estimate how much oil that No. 2 well would produce during its life?

A. The remainder of the life of the field, no, sir.

Q. From now on?

A. No, sir.

The Court:

They have them all cut down to about twenty barrels, haven't they?

Mr. Hart:

Yes, sir.

Q. If an additional well is drilled on the Selby Oil & Gas Company's tract it would produce during its producing life about as much oil as this well No. 2 on the Hastings & Dodson tract, wouldn't it?

A. Probably so, but that wouldn't take care of the condition.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Lee asked you in his last question whether or not there would be any migration of oil from the Selby Oil & Gas Company to the Hastings & Dodson lease, and you said no. Did you mean by that there wouldn't be any drainage?

A. No. There is drainage. You confused migration and drainage, I take it.

Mr. Lee:

I just asked you about migration.

A. There wouldn't be any movement of oil from the Selby tract—I mean the reverse of that—there might be movement of oil or drainage of oil from the Selby to the Hastings & Dodson tract.

The Court:

Unless you have a low pressure here?

A. Yes, sir.

104 The Court:

If you have low pressure it wouldn't go there?

A. Yes, sir, the difference in density, if taken on a lease basis, would tend to cause that low pressure area on the Hastings & Dodson lease, your Honor.

(Witness excused.)

Mr. Hart:
Is this written instrument in evidence?

Mr. Moody:
I am going to offer it in evidence right now. This is his report. If you gentlemen have no objection, I will give you a copy and offer it in evidence.

Mr. Lee:
Your Honor, we are going to object to it.

Mr. Moody:
You object to it?

Mr. Lee:
Yes.

Mr. Moody:
I withdraw the offer, then. That is all.

Mr. Lee:
If the Court please, I don't see any necessity in putting any evidence on in the present condition of the record. I don't think they have made a case justifying the overturning of an order of the Railroad Commission, even without any proof on our part. Now, if the Court thinks otherwise, we are prepared to put on our proof and will do it, but we think that there is absolutely no evidence here to justify this Court in overturning the Railroad Commission order under attack.

Mr. Moody:
May it please the Court, it just occurs to me that I didn't state in our stipulation about Rule 37, and that may be what he has in mind.

Mr. Lee:
No, it is not based on that.

Mr. Moody:

Do you have any objection to the stipulation showing that Rule 37 as promulgated by the Railroad
105 Commission, was in force in April and July, 1939, as alleged in plaintiffs' petition?

Mr. Lee:

Yes, that is all right. I was not basing my position on that ground.

Mr. Hart:

Before that stipulation goes in, I don't know whether the entire rule was pleaded in your complaint.

Mr. Moody.

I just copied certain parts as is shown there in the complaint.

Mr. Hart:

We would like to have it understood that the entire rule be in evidence.

Mr. Moody:

All right.

(The above referred to Rule 37 was thereupon received in evidence, a copy to be furnished by counsel for the Railroad Commission of Texas and such copy to be sent up as an original exhibit; such copy is designated EXHIBIT 8.)

Mr. Lee:

I am not trying to get at any technical ground on that. I just think on the broadest basis you can place the lawsuit that they have not overcome the prima facie validity of that order.

The Court:

Do you gentlemen want to argue that?

Mr. Moody:

Your Honor, I only have a few words to say about it. The testimony before the Court is that the examiner of the Railroad Commission who held the hearing reported to the Commission that the testimony showed there is no net loss of oil to the applicant's lease. That was the testimony before the Railroad Commission; and the Railroad Commission here makes an order in the face of that statement as to the facts before the Commission,
106 and says that the order is granted for the purpose of preventing confiscation of property. Now, the testimony shows that this tract now has substantially the average density of the surrounding leases; that it has produced more oil per acre than the average of the surrounding leases; that it has produced about as much oil as any of them with the exception of the Weaver-Crim lease, and that if this well is permitted to be drilled it would have a greater density than any surrounding lease and a much greater density than the average of the East Texas field. Now, the testimony is without dispute that the drilling of the well would cause drainage to this tract of land from adjoining leases and that the well is not necessary to enable this party to produce its oil. I think that makes a case.

The Court:

My understanding is that the State Courts have, in many instances, granted injunctions of this character. However, what are you going to do with the decision of the Supreme Court in this Rowan & Nichols case in which they practically tell this Court not to substitute its judgment for that of the Commission any more.

Mr. Moody:
I am going to try to get them to reverse that on a motion for rehearing, your Honor.

The Court:
Here is a matter that is confined to the discretion of the Commission: they are supposed to conserve the natural resources of the state, and they have the discretion under the law as to the granting of permits for the drilling of oil wells. They conclude that this tract should have another well on it. I don't see how I can, under that decision, substitute my judgment and discretion
107 for theirs and restrain them by injunction. I think the order should be denied.

Mr. Moody:
Very well, your Honor.

The Court:
You prepare the order.

Mr. Lee:
Yes, sir.

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109 AGREEMENT OF COUNSEL.

We the undersigned Attorneys of Record for Plaintiffs and Defendants in Cause No. 27-Civil Action, styled Selby Oil & Gas Company and Lewis Production Company vs. Railroad Commission of Texas, et al., filed in the United States District Court, Western District of Texas, Austin Division, do hereby agree that the foregoing pages numbered 1 through 43, inclusive, contain and constitute a full, true and correct transcript of all oral evidence introduced upon the trial of the above mentioned cause, together

with the objections and exceptions made and taken in connection with the introduction and exclusion of evidence, and the rulings and remarks of the Court thereon; and agree that said transcript, in duplicate, may be filed as the stenographic statement of evidence in this cause.

We further agree that all documentary evidence introduced upon the trial of this cause is to be sent up in its original form.

This the 11th day of November, 1940.

(S.) DAN MOODY,
Attorney for Plaintiffs.

(S.) JAMES P. HART,
Attorney for Defendants, Railroad Commission of Texas and Commissioners Smith, Thompson & Sadler.

(S.) W. EDWARD LEE,
Attorney for Defendants, O. L. Hastings and C. F. Dodson.

Statement of Evidence. Filed 14th day of November, 1940.

110 CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 109 pages is a true and correct transcript of proceedings had and orders entered, as therein stated, in Cause No. 27 Civil Action, styled Selby Oil & Gas Company, et al. versus Railroad Commission of Texas, et al., as the same appear on file and of record in this office.

I further certify that said transcript embraces only such pleadings, process and orders as are specified in the joint praecipe filed herein by the parties to the suit.

Witness my official signature and the seal of said District Court, at office in the City of Austin, Texas, this the 15th day of November, A. D. 1940.

MAXEY HART,
(Seal) Clerk of said Court,
By JOE STEINER, Deputy.

[fol. 106] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 27th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

On this day this cause was called, and, after argument by Dan Moody, Esq., for appellants, and W. Edward Lee, Esq., James D. Smullen, Esq., and Ed Roy Simmons, Esq., for appellees, was submitted to the Court.

[fol. 107] COPY OF OPINION OF THE COURT AND DISSENTING OPINION THERETO OF McCORD, CIRCUIT JUDGE—Filed May 13th, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9729

SELBY OIL & GAS COMPANY et al., Appellants,

versus

RAILROAD COMMISSION OF TEXAS, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(May 13, 1942)

Before Foster, Hutcheson, and McCord, Circuit Judges

HUTCHESON, Circuit Judge:

Exhibiting the requisite diversity, and brought in the appropriate court, the United States District Court of

Travis County, Texas, to hold invalid and cancel an order granting a drilling permit and to enjoin all action under it, the suit presented two claims for relief each resting on a distinct jurisdictional basis. In one of these, a claim that the order deprived plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, the jurisdiction was rested on the existence of a federal question. In the other, a statu- [fol. 108] tory suit, under Section 8, Art. 6049 (c), Vernon's Texas Annotated Civil Statutes, 1925, the jurisdiction was rested on diversity of citizenship.[1] In the constitutional suit, it was claimed that the order[2] of the commission was invalid and the result of its granting would be to deprive plaintiffs of their property without due process of law. In the statutory suit, the claim was that the conclusion that the granting of the exception was necessary to prevent confiscation of permit-ee's property, was

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[1] Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362; McMillan v. Railroad Commission of Texas, 51 F. (2d) 400; Gulf Land Co. v. Atlantic Refining Co., 113 F. (2d) 902; Stanolind Oil & Gas Co. v. Ambrose, 118 F. (2d) 847; Sun Oil Co. v. Burford, 124 F. (2d) 467.

[2] "Rule 37. #2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

#2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

not supported by substantial evidence [3] and the order was therefore invalid under the statute. The defenses were, a denial as to the constitutional claim that the grant of the permit was violative of the due process clause, and as to the statutory claim that it was invalid under the statute, and an affirmative plea that the order granting a permit for a second well on the tract, as necessary to prevent the confiscation of property, was supported by substantial evidence.

[fol. 109] Plaintiffs' evidence included testimony upon the constitutional claim that permit-ee, by the drilling of the second well allowed under the permit, would have a production and drainage advantage over each and every lease surrounding it, and upon the statutory claim that permit-ee was not suffering any drainage or damage which would prevent it from recovering all the oil then under the lease and therefore the grant of the permit was not necessary to prevent confiscation of permit-ee's property. At its conclusion defendants offered no evidence but moved for judgment and the colloquy following ensued. The Court: "My understanding is that the State Courts have, in many instances, granted injunctions of this character. However, what are you going to do with the decision of the Supreme Court in this Rowan & Nichols Case in which they practically tell this Court not to substitute its judgment for that of the Commission any more?" Mr. Moody for plaintiff: "I am going to try to get them to reverse that on a motion for rehearing, your Honor." The Court: "Here is a matter that is confined to the discretion of the commission; they are supposed to conserve the natural resources of the state, and they have the discretion under the law as to the granting of permits for the drilling of oil wells. They conclude that this tract should have another well on it. I don't see how I can, under that decision, substitute my judgment and discretion for theirs and restrain them by injunction. I think the order should be denied." Mr. Moody: "Very well, your Honor." The Court: "You prepare the order." Mr. Lee for defendants: "Yes, sir." On July 18, 1940, there was a judgment, denying plaintiffs

[3] 35 Tex. Jur. 712; Gulf Land v. Atlantic Refining Co., 134 Tex. 59; Richey v. Shell Petroleum Co., 128 S. W. (2d) 898; Railroad Commission v. Shell, Supreme Court of Texas, March 11, 1942, — S. W. (2d) —.

the relief they sued for, and they appealed.

In *Sun Oil Company v. Burford*, 124 F. (2d) 467, in which as here, there were two claims, one that there had been a denial of due process, the jurisdiction based upon the presence of a federal question, the other, a suit under the statute, the jurisdiction based on diversity of citizen- [fol. 110] ship, this court on December 29, 1941, purported to find[4] and follow in the *Rowan* and *Nichols* Cases, 310 U. S. 580, 311 U. S. @ 577 and 614, cases dealing not with an exception to Rule 37 but with general proration orders, a *dictum* confining the federal courts, not only in cases where the jurisdiction was, as in *Rowan's* Case, rested solely on a federal question but in cases where there was diversity jurisdiction, to a consideration of violations of the federal constitution, and prohibiting the federal court of Travis County from entertaining the jurisdiction conferred upon the courts of Travis County by the Texas statute.[5]

Because of the decision of our court in the *Burford* Case rendered since the appeal was taken, appellees insist here that the appeal must be determined not as an appeal from the order on the statutory action, but simply and entirely as an appeal from the claim asserted on constitutional grounds. Appellants, on their part, urge; that the *Burford* Case was, in that respect, wrongly decided; that the Su-

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[4] "However in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under the Federal Constitution should be relegated to the State court, as was found by the court below." 124 F. (2d) 469.

[5] This jurisdiction so conferred has been uniformly exercised in the federal court for the Western District of Texas since 1894, when the Supreme Court of the United States in the Reagan Case, Note 1, supra, sustained a suit brought in the Travis County Division, Western District of Texas against the Railroad Commission of Texas, saying that that court was a court of competent jurisdiction in Travis County, Texas, and where there was the requisite diversity, plaintiff could maintain his suit against the commission there.

preme Court in the *Rowan* and *Nichols* Case, where there was no diversity, jurisdiction being based entirely on a federal question, did not determine, it could not have determined that the Federal District Court of Travis County was without jurisdiction where there was the requisite diversity to hear and grant relief in a suit brought under the Texas statute. We agree with appellants. In *Magnolia Petroleum Co. v. Blankenship*, 85 F. (2d) 537, and again in *Gulf Land Co. v. Atlantic Refining Co.*, 113 [fol. 111] F. (2d) 902, we clearly pointed out the distinction between the Texas statutory suit and a suit for equitable relief on federal constitutional grounds.

In the first *Rowan* Case, 310 U. S. 580, the court said: "*Except where the jurisdiction rests, as it does not here, on diversity of citizenship*, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the due process clause may place upon the exercise of the state's regulatory powers." (Italics supplied.) Thus, when in denying the motion for rehearing, in that case, it declared, 311 U. S. @ 615: "The court below also erred in holding the order a violation of the Texas statute requiring proration on a reasonable basis. In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts", the court was talking not about persons having the requisite diversity and suing under the statute but about Rowan and Nichols who were citizens of Texas and therefore must, if they brought the statutory action fixed by the statute in Travis County, bring it in the state court of that county. Further, when on the same page the court said, "but in any event as we read the Texas cases, the standard of reasonable basis under the statute opens the same range of inquiry as the respondent in effect asserted to exist in his claims under the due process clause. These later claims we have found untenable. What ought not to be done by the federal courts when the due process clause is invoked, ought not be attempted by these courts under the guise of enforcing a state statute", the court was not dealing with the state statutory suit to review the commission's order brought in the federal court of Travis County, under the authority of the Texas statute providing for such review. It was dealing with the claim of Rowan and Nichols, citizens of

Texas, advanced in their suit for the extraordinary relief [fol. 112] of injunction on the federal constitutional ground that the commission's order had violated the Texas statute requiring proration on a reasonable basis and not being in accordance with the statute had deprived them of due process. What is in question here in the statutory phase of the suit is a very different thing. This is, whether, under the rules established by the Texas courts, the order of the commission granting an exception to its Rule 37, to prevent confiscation, is supported by reasonable evidence. The Texas decisions are clear that whether the exception to the rule is granted for confiscation or for waste, a litigant in the statutory suit is entitled to have the independent judgment of the trial court based, not of course upon the evidence offered before the commission,—that is wholly immaterial—, but upon the evidence offered on the trial as to whether the order rests upon a reasonable basis, that is whether it is supported by substantial evidence.

Under these authorities it was the duty of the trial court not only to determine whether plaintiffs in their constitutional suit showed confiscation in violation of the Fourteenth Amendment, but also to determine whether they had prevailed upon their claim in their statutory suit, that the order granting an exception to prevent confiscation was unsupported by substantial evidence. It was its duty too, under Rule 52, Rules of Civil Procedure, to make findings. "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon." By the course this case took below, plaintiffs and this court were deprived of the judgment of the trial judge on the facts, and they and we have been deprived of the benefit of his findings. Because this is so, this court will not undertake to determine the issues on their merits for itself, but will reverse the cause and remand it to the district court for a retrial and for further proceedings not inconsistent herewith.

[fol. 113] McCord, Circuit Judge, Dissenting:

I have no quarrel with the opinion of my brothers in this case. In a clear and logical manner the opinion succinctly states the law as I think it should be applied in

cases of this kind where jurisdiction of the federal court is invoked by reason of the diversity of citizenship of the parties. However, the language and implication of the Supreme Court opinions in the *Rowan & Nichols* Case have given rise to no little doubt and confusion as to the proper method of disposing of cases involving the conservation laws of a state. In *Sun Oil Company v. Burford*, 124 F. 2d 467, a conservation case involving an order of the Railroad Commission of Texas, jurisdiction was alleged to exist both because of diversity of citizenship and the presence of a federal question. In disposing of the case this court, in an opinion by Judge Dawkins, said that "in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under *under* the Federal Constitution should be relegated to the State court, as was found by the court below." I think that this recent opinion in the *Sun Oil Company* Case should be adhered to, and that we should not change face and position until the Supreme Court has considered the point and finally clarified the issue.

I respectfully dissent.

[fol. 114] JUDGMENT

Extract from the Minutes of May 13th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded

to the said District Court for a retrial and for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Railroad Commission of Texas, and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"McCord, Circuit Judge, dissents."

[fols. 115-117] PETITION OF APPELLEES HASTINGS AND DODSON FOR REHEARING—Filed June 1, 1942

No. 9729

In the

United States Circuit Court of Appeals

FIFTH CIRCUIT

SHELBY OIL & GAS COMPANY, ET AL.,
Appellants,

v.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees.

Appeal from the District Court of the United States, for the Western District of Texas

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PETITION OF APPELLEES HASTINGS AND DODSON FOR REHEARING

To Said Honorable Court:

Now come appellees O. L. Hastings and C. F. Dodson and petition the court to set aside its opinion and judgment rendered and entered herein on May 13, 1942, reversing the judgment of the trial court and remanding this cause for retrial and further proceedings not inconsistent with said opinion, and to grant them a rehearing and on rehearing to render and enter judgment affirming the judgment of the trial court. As grounds therefor the following are presented and relied upon.

First Ground

The decision in this case is contrary to and in conflict with the opinions of the Supreme Court in the *Rowan & Nichols cases, 310 U. S. 573, 311 U. S. 614 (on rehearing);* and *311 U. S. 570.*

Second Ground

The court erred in overruling its prior recent opinion in the case of *Sun Oil Company v. Burford, 124 Fed. (2d) 467,* which opinion in holding

> "• • •*in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court* appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have *said all issues other than questions under the Federal Constitution should be relegated to the State Court* • • •." (Italics ours.)

correctly interpreted and followed the holdings of the Supreme Court in the *Rowan & Nichols cases.*

This petition is filed under the belief there are good grounds to support it, is not interposed for the purpose of delay, and is not intended as harassment to appellants. Supporting argument is therefore submitted, under separate cover, of which petitioners pray this court's consideration.

Attorneys for appellants are Honorable Dan Moody, Norwood Building, Austin, Texas, and Mr. E. R. Hastings, Tulsa, Oklahoma; and the attorney for all other appellees is Honorable Gerald C. Mann, Attorney General of Texas,

Austin, Texas. Copies of this petition have been delivered to each of said attorneys.

WHEREFORE, premises considered, these petitioners pray that the opinion and judgment of this court rendered and entered on May 13, 1942, be set aside and that these petitioners be granted a rehearing, and on rehearing that the court render and enter judgment affirming the judgment of the trial court, and that they have their costs and other relief to which they are entitled.

Respectfully submitted,

EARLE B. MAYFIELD *and*
W. EDWARD LEE,
1400 Peoples Bank Building,
Tyler, Texas,
Attorneys for Petitioners, O. L. Hastings and C. F. Dodson.

W. EDWARD LEE,
Of Counsel

[fols. 118-121] PETITION FOR REHEARING OF RAILROAD COMMISSION OF TEXAS, APPELLEE—Filed June 1, 1942

No. 9729

United States Circuit Court of Appeals

FIFTH CIRCUIT

SELBY OIL AND GAS COMPANY ET AL
Appellants

v.

RAILROAD COMMISSION OF TEXAS, ET AL
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

APPELLEES' PETITION FOR REHEARING AND SUPPORTING ARGUMENT

To the Honorable Judges of the United States Circuit Court of Appeals:

The Railroad Commission of Texas, one of the appellees in the above styled and numbered cause, respectfully presents this its petition for rehearing and in support thereof submits the following grounds:

1

This Court erred in holding that where jurisdiction rests on diversity of citizenship in cases involving the conservation of the State's natural resources that Federal Courts will pass on issues arising

under state law under the provisions of Section 8 of Article 6049c, Vernon's Texas Annotated Civil Statutes.

2.

This court erred in overruling its very recent opinion in the case of Sun Oil Company v. Burford, et al., 124 Fed. (2d) 467, which opinion correctly interprets and follows the opinions of the Supreme Court in the Rowan and Nichols cases, 310 U. S. 573, 311 U. S. 614 (on rehearing); and 311 U. S. 570.

3.

This court erred in holding that the United States District Court sitting in Travis County, Texas, was authorized to substitute its judgment for that of the Railroad Commission on the question of the necessity for the exception to the Commission's spacing rule involved herein to prevent confiscation of property.

4.

This court erred in holding that the United States District Court erred in failing to file findings of fact and conclusions of law herein, said District Court having sustained appellees' motion for judgment at the completion of appellants' case.

5.

In the event this court is correct in holding that the trial court erred in failing to file findings of fact and conclusions of law herein then this court erred in failing to find that such error of the trial court, in the state of the record in this case, was harmless.

6.

If this court is correct in its holding that the trial court had jurisdiction to pass on issues arising under State law, then this court erred in failing to hold that as a matter of law appellants failed to overcome the prima facie validity of the commission's permit order in suit.

7.

If this court is correct in its holding that the trial court could pass on issues of fact arising under State law, then this court erred in failing to hold that appellants own evidence proved as a matter of law that the permit order in suit was reasonably supported by substantial evidence.

8.

This court erred in failing to hold that appellants wholly failed to make a prima facie case on their claim that the order in suit deprived them of their property without due process of law in violation of

the fourteenth amendment to the Federad Constitution.

Appellee, The Railroad Commission of Texas, prays that this petition for rehearing be granted and that the former judgment of the Court be vacated and that the judgment of the District Court be affirmed.

Respectfully submitted,

GERALD C. MANN
Attorney General of Texas
GROVER SELLERS
CECIL C. ROTSCH

JAMES D. SMULLEN

ED ROY SIMMONS
Assistant Attorneys General
Attorneys for Appellee
Railroad Commission of Texas

I, ED ROY SIMMONS, an attorney of record for appellee, The Railroad Commission of Texas in this cause DO HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

WITNESS MY HAND this 30th day of May A. D. 1942.

ED ROY SIMMONS

[fol. 122] ORDER DENYING REHEARINGS

Extract from the Minutes of June 30th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

[fol. 123] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 124] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

O. L. HASTINGS, et al., Petitioners,

vs.

SELBY OIL AND GAS COMPANY, et al.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioners,

It Is Ordered that the time for filing petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including November 14, 1942.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of September, 1942.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 528

ORDER ALLOWING CERTIORARI—Filed December 14, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 495.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.